

No. 14821

United States
Court of Appeals
for the Ninth Circuit

—
KAL W. LINES,

Appellant,

vs.

FALSTAFF BREWING CO., et al.,

Appellee.

—

Transcript of Record

—

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JAN - 3 1956



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavits of:	
Drinnen, William C.	75
Gross, Henry	69
Shapro, Arthur P.	73
Singer, Ben	76
Appeal:	
Certificate of Clerk to Record on	101
Concise Statement of Points to Be Urged Upon, Appellant's	104
Cost Bond on	98
Notice of	98
Attorneys, Names and Addresses of	1
Certificate of Clerk to Record on Appeal	101
Certificate and Report of Referee Relative to Petition for Review of Referee's Order	27
Ex. A—Summary of Record, Findings of Fact and Conclusions of Law Rela- tive to Contest Over Election of Bankruptcy Trustee	46
Concise Statement of Points to Be Urged Upon Appeal, Appellant's	104

INDEX	PAGE
Cost Bond on Appeal	98
Memorandum and Order	79
Notice of Appeal	98
Order of Adjudication	9
Order Extending Time to File Petition for Review	67
Order Extending Time to File Proposed Amendments to Findings of Fact and Con- clusions of Law, Etc.	86
Order Re Court's Memorandum and Order....	93
Order Reversing Referee's Order Appointing Kal W. Lines Trustee	94
Order Staying Administration Pending Review	68
Petition	3
Petition for Review	61
Proposed Amended Findings, Conclusions of Law and Order	86
Statement of Affairs and Schedules of Bankrupt	10
Stipulation Re Proofs of Claim	107

NAMES AND ADDRESSES OF ATTORNEYS

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155 Montgomery St.,
San Francisco, California,
Attorneys for Appellees.

In the Southern Division of the United States
District Court for the Northern District of
California

In Bankruptcy No. 42878

In the Matter of:

ALFONSO PAUL SANFILIPPO,

Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the United States Dis-
trict Court for the Northern District of Cali-
fornia.

The Petition of Alfonso Paul Sanfilippo, residing
at No. 1320 Lombard Street, in San Francisco, State
of California, by occupation a Distiller's Rep-
resentative and employed by Seagrams Distillers,
who states that he has not been known by any other
name or trade name, for the past six years, other
than Alfonso Paul Sanfilippo, individually and
doing business as "Stag Liquors," Respectfully
Represents:

1. Your petitioner has had his principal place
of business [or has resided, or has had his domicile]
at San Francisco, California, within the above judi-
cial district, for a longer portion of the six months
immediately preceding the filing of this petition
than in any other judicial district.

2. Your petitioner owes debts and is willing to
surrender all his property for the benefit of his

creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statement concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore Your Petitioner Prays, That he may be adjudged by the court to be a bankrupt within the purview of said Act.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

HENRY GROSS and
FRANCIS P. WALSH,

By /s/ HENRY GROSS,
Attorneys for Petitioner.

United States of America,
State of California,
City and County of San Francisco—ss.

I, Alfonso Paul Sanfilippo, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Subscribed and sworn to before me this 15th day of April, 1954.

[Seal] /s/ ADA V. PENNINGTON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Title of District Court and Cause.]

VERIFIED LIST OF CREDITORS

Now comes Alfonso Paul Sanfilippo, the above-named bankrupt, and files herewith his verified list of creditors pursuant to the provisions of Section 7a(8) of the Act of Congress relating to Bankruptcy.

McKesson & Robbins, Inc., P.O. Box 836, Main
P.O., San Francisco, Calif.

Falstaff Brewing Corporation, Box 468 Main P.O.,
San Francisco, Calif.

A. K. Thanos Company, 480 Second St., San Fran-
cisco, Calif.

Rathjen Bros., Inc., 135 Berry St., San Francisco,
Calif.

Max Sobel Wholesale Liquors, 240 Second St., San
Francisco, Calif.

Alexandria Distributing Company, 180 Townsend
St., San Francisco, Calif.

Haas Brothers, Third & Channel Sts., San Fran-
cisco, Calif.

San Francisco Brewing Corporation, 490 Tenth St.,
San Francisco, Calif.

Juillard, Inc., 840 Tennessee St., San Francisco,
Calif.

Ralph Montali, Inc., 548 Third St., San Francisco,
Calif.

Acme Breweries, 762 Fulton St., San Francisco,
Calif.

J. C. Millett Co., 118 Sacramento St., San Francisco,
Calif.

Vick's Distributing Co., 2341 San Pablo, Oakland,
Calif.

Goebel Brewing Co. of California, 533 Kirkham,
Oakland, Calif.

Gallo Sales Co., 1001 Brannan St., San Francisco,
Calif.

California Wine Association, 900 Minnesota, San
Francisco, Calif.

Atlas Paper Co., 740 Folsom St., San Francisco,
Calif.

Petri Distributing Co., 655-4th St., San Francisco, Calif.

Melvin Sosnick Co., 801 McAllister St., San Francisco, Calif.

Eagle Vineyard Products Co., 1020 Folsom St., San Francisco, Calif.

Monteverde & Parodi, 100 Broadway, San Francisco, Calif.

Anheuser-Busch, Inc., 1650 Third St., San Francisco, Calif.

Twin Peaks Distributing Co., 1050-25th St., San Francisco, Calif.

Pabst Sales Co., 475 Main St., San Francisco, Calif.

Glaser Bros., 422 Second St., San Francisco, Calif.

Alpha Distributing Co., 480 Second St., San Francisco, Calif.

Harry F. Rathjen Co., 2607 Cypress St., Oakland, Calif.

Golden Brand Bottling Co., 275 Barneveld Ave., San Francisco, Calif.

N. Cervelli & Co., 3319 Fillmore St., San Francisco, Calif.

Baruh Liquors, Inc., 256 N. First St., San Jose, Calif.

Pacific Gas & Electric Co., 245 Market St., San Francisco, Calif.

American Burglar Alarm, 165 Jessie St., San Francisco, Calif.

Carlo Arbasetti, 1194 Hollister Ave., San Francisco, Calif.

Brown & Bigelow, St. Paul, Minnesota.

- Firemen's Ins. Co. of Newark, N. J., 220 Bush St.,
San Francisco, Calif.
- Golden Bear Wine Co., 1077 McAllister St., San
Francisco, Calif.
- Felix Lauricella, Attorney at Law, 68 Post St., San
Francisco, Calif.
- Edwin J. Marino, 1600 McKinnon Ave., San Fran-
cisco, Calif.
- Pacific Telephone & Telegraph Co., 444 Bush St.,
San Francisco, Calif.
- Pacific Coast Brands, 2700-18th St., San Francisco,
Calif.
- Albert Peters Co., 1544 Pine St., San Francisco,
Calif.
- Sunset Scavenger Co., Ft. of Tunnel Ave. & Beatty
Rd., San Francisco, Calif.
- San Francisco Water Department, 425 Mason St.,
San Francisco, Calif.
- Providenza & Venerando San Filippo, 2320 Filbert
St., San Francisco, Calif.
- Anglo California National Bank, 35 Cambon Dr.,
San Francisco, Calif.
- American Trust Company, 1 Grant Ave., San Fran-
cisco, Calif.
- Robert S. Atkins, 150 Sutter St., San Francisco,
Calif.
- Safe Realty Co., 2344 Judah St., San Francisco,
Calif.
- Macy's, Stockton at O'Farrell, San Francisco, Calif.
- Dr. Gertrude Flint Jones, 490 Post St., San Fran-
cisco, Calif.

Dr. Oliver Bailey, 490 Post St., San Francisco,
Calif.

Director of Internal Revenue, 100 McAllister St.,
San Francisco, California.

Duly verified.

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

ORDER OF ADJUDICATION
AND REFERENCE, ETC.

At San Francisco, in said District, on the 19th
day of April, 1954.

The Petition of Alfonso Paul Sanfilippo, indi-
vidually and doing business as Stagg Liquors, filed
on the 16th day of April, 1954, that he be adjudged
a bankrupt under the Act of Congress relating to
Bankruptcy, having been heard and duly considered,
and no opposition being made thereto,

It Is Adjudged that the said Alfonso Paul San-
filippo, etc., is a bankrupt under the Act of Congress
relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding
be, and it is hereby referred to Burton J. Wyman,
one of the Referees in Bankruptcy of this Court
who will be in charge thereof, and to Bernard J.
Abrott, Referee in Bankruptcy of this Court, in the
event Burton J. Wyman shall be unable to act to
take such further proceedings therein as are re-

quired and permitted by said Act, and that the said Alfonso Paul Sanfilippo shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder," a newspaper published in the County of San Francisco, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated April 19, 1954.

/s/ GEORGE B. HARRIS,
District Judge.

[Endorsed]: Filed April 19, 1954.

[Title of District Court and Cause.]

STATEMENT OF AFFAIRS AND
SCHEDULES A AND B

(Note.—Each question should be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached.

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition," as used in the following questions, shall mean the petition filed under section 3b or 4a of chapter III, section 322 of chapter XI, section 422 of chapter XII, of section 622 of chapter XIII.)

This statement of affairs is to be filed with the Court in triplicate in every case. With the petition in proceedings under Chapters XI, XII, XIII and five days prior to the first meeting of creditors in all other cases (Sec. 7, Laws of 1938).

Proceedings shall be entitled "In Bankruptcy," "In Proceedings for—a Composition or Extension,"—the Reorganization of a Railroad,"—a Composition by a Public Debtor,"—the Reorganization of a Corporation,"—an Arrangement,"—A Real Property Arrangement," or—a Wage Earner Plan," as the case may be. Rule 5 Paragraph 4.

In proceedings under chapter VIII, X, XI, XII, or XIII, of the Act, unless and until the debtor is adjudicated a bankrupt he shall be referred to as a "debtor." In proceedings under chapter IX, the debtor shall be referred to as the "petitioner." Rule 5, paragraph 5.

1. Nature, Location and Name of Business.

a. What business are you engaged in?

Off-sale retail liquor store. Closed December 17, 1953.

b. Where, and under what name, do you carry on such business?

6273 Third Street, San Francisco, Calif. Under name of Stag Liquors.

c. When did you commence such business?

July 1, 1951.

d. Where else, and under what other names, have you carried on business within the six years immediately preceding the filing of the original petition herein?

No other business.

2. Books and Records.

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original petition herein?

Joseph Greenberg, Hearst Bldg., San Francisco; February, 1952, to March, 1953; bankrupt kept his own books from July 1, 1951, to February, 1952, and from March, 1953, to December 17, 1953.

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original petition herein?

No formal audits were ever made.

c. In whose possession are your books of account and records?

Board of Trade, 444 Market St., San Francisco.

3. Financial Statements.

a. Have you issued any financial statements within the two years immediately preceding the filing of the original petition herein?

Not to the best of my knowledge and recollection.

4. Inventories.

a. When was the last inventory of your property taken?

December 18, 1953.

b. By whom, or under whose supervision, was this inventory taken?

By the Board of Trade of San Francisco.

c. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.)

\$3,180.00 at cost to bankrupt.

d. When was the next prior inventory of your property taken?

July 1, 1953.

e. By whom, or under whose supervision, was this inventory taken?

By the bankrupt.

f. What was the amount, in dollars, of the inventory?

g. In whose possession are the records of the two inventories above referred to?

Board of Trade of San Francisco.

5. Income Other Than From Operation of Business.

a. What amount of income other than from the operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein?

Employed by Seagram Distillers Corporation since March 1, 1953, at a basic salary of \$400.00 per month.

Disability pension of \$13.80 per month arising out of Marine Corps service.

6. Income Tax Returns.

a. Where did you file your last federal and state income tax returns, and for what years?

San Francisco, for 1953.

7. Bank Accounts and Safe Deposit Boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein?

Commercial account at American Trust Co., 3rd & Palou Office, in name of Stag Liquors. Bankrupt only person authorized to draw on this account.

Commercial account at same bank in name of Al Sanfilippo. Transferred to Marina Branch around December, 1953. Bankrupt only person authorized to draw on this account.

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original petition herein?

Never had a safe-deposit box or access to anyone else's safe-deposit box.

8. Property Held in Trust.

a. What property do you hold in trust for any other person?

None.

9. Prior Bankruptcy or Other Proceedings;
Assignments for Benefit of Creditors.

a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein?

None.

b. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee?

No, except for \$4,054.88 held by the Board of Trade of San Francisco.

c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your

creditors, within the two years immediately preceding the filing of the original petition herein?

On December 17, 1953, made a general assignment of all assets of the business to the Board of Trade of San Francisco for the benefit of my creditors.

10. Loans Repaid.

a. What repayment of loans have you made during the year immediately preceding the filing of the original petition herein?

Regular monthly payments as follows:

(1) American Trust Company on chattel mortgage on automobile. Originally about \$1,650; monthly payments \$68.23; paid down to \$1,298.65.

(2) Morris Plan—Unsecured business loan \$1,500.00; monthly payments \$94.00; fully paid off.

(3) Anglo-California Nat'l Bank—On chattel mortgage on furniture; original loan \$700.00; monthly payments \$58.35; present balance \$232.80.

11. Transfer of Property.

a. What property have you transferred or disposed of, other than in the ordinary course of business, during the year immediately preceding the filing of the original petition herein?

12. Accounts Receivable.

a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original petition herein?

Assignment to Board of Trade—see 9c above.

Assigned certain delinquent accounts to Atlas Credit Association, 1005 Market St., San Francisco, for collection; all others to Board of Trade under general assignment.

13. Losses.

a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the petition herein?

No.

* * *

/s/ ALFONSO PAUL SANFILIPPO,
Bankrupt.

State of California,
City and County of San Francisco—ss.

I, Alfonso Paul Sanfilippo, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Bankrupt.

Subscribed and sworn to before me this 23rd day of April, 1954.

[Seal] /s/ ADA V. PENNINGTON,
Notary Public in and for the City
and County of San Francisco,
State of California.

Schedule A—Statement of All Debts of Bankrupt

Schedule A-1.

Statement of All Creditors to Whom Priority
Is Secured by the Act

Claims Which Have Priority	Amount Due or Claimed
a. Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding \$600 each, earned within three months before filing the petition. None	\$ 0.00
b. Taxes due and owing to—	
(1) The United States: Director of Internal Revenue, 100 McAllister St., San Francisco, Calif., 4th quarter of 1953, withholding and F.I.C.A. contributions	Unknown
(2) The State. None	0.00
(3) The county, district or municipality of. None	0.00

c.

(1) Debts owing to any person, including the United States who by the laws of the United States is entitled to priority. None	\$	0.00
(2) Rent owing to a landlord who is entitled to priority by the laws of the State of....., accrued within three months before filing the petition, for actual use and occupancy. None		0.00
Total	\$	0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-2.

Creditors Holding Securities

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors and also particulars concerning each debt, as required by the Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and if so, with whom.]

	Value of Securities	Amount Due or Claimed
American Trust Company, 1 Grant Avenue, San Francisco, Calif.—Chattel mortgage on 1953 Ford Tudor Sedan	\$1,300.00	\$ 1,298.65
Anglo-California National Bank, Park-Mer- ced Branch, San Francisco, Calif.—Chat- tel mortgage on furniture	500.00	232.80
Veteran's Administration, 49-4th Street, San Francisco, Calif.—Loan on National Service life insurance policy, \$2,500.00 face value, 20-year endowment; monthly premium approximately \$7.90; amount of loan approximately \$480.00; surrender value approximately \$480.00		480.00
Total		\$ 2,011.45

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-3.

Creditors Whose Claims Are Unsecured

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to

Ledger or Voucher	Amount Due or Claimed
1. Acme Breweries, 762 Fulton St., San Francisco, Calif.	\$ 326.40
2. Alexandria Distributing Co., 180 Townsend St., San Francisco, Calif.	598.57
3. Alpha Distributing Co., 480-2nd St., San Fran- cisco, Calif.	347.82
4. American Burglar Alarm, 165 Jessie St., San Francisco, Calif.	12.96
5. Anheuser-Busch, Inc., 1650-3rd St., San Fran- cisco, Calif.	Unknown
6. Arbasetti, Carlo, 1194 Hollister Ave., San Fran- cisco, Calif.	74.95
7. Atlas Paper Co., 740 Folsom St., San Francisco, Calif.	66.99
8. Atkins, Robert S., 150 Sutter, San Francisco, Calif.	10.70
9. Bailey, Dr. Oliver, 490 Post St., San Francisco, Calif.	Unknown
10. Baruh Liquors, Inc., 256 N. First St., San Jose, Calif.	72.34
11. Brown & Bigelow, St. Paul, Minn.	23.24
12. California Wine Association, 900 Minnesota St., San Francisco, Calif.	98.66
13. Cervelli, N. & Co., 3319 Fillmore St., San Fran- cisco, Calif.	86.51
14. Eagle Vineyard Products Co., 1020 Folsom St., San Francisco, Calif.	29.16
15. Falstaff Brewing Corporation, 468 Main P. O., San Francisco, Calif.	1,343.37
16. Firemen's Insurance Co. of Newark, N. J., 220 Bush St., San Francisco, Calif.	20.86

17. Gallo Sales Co., 1001 Brannan St., San Francisco, Calif.	\$ 96.52
18. Glaser Brothers, 422-2nd St., San Francisco, Calif.	497.61
19. Goebel Brewing Co. of California, 533 Kirkham, Oakland, Calif.	204.64
20. Golden Bear Wine Co., 1077 McAllister St., San Francisco, Calif.	131.17
21. Golden Brand Bottling Co., 275 Barneveld Ave., San Francisco, Calif.	54.50
22. Haas Brothers, 2nd & Channel Sts., San Francisco, Calif.	489.95
23. Jones, Dr. Gertrude Flint, 490 Post St., San Francisco, Calif.	15.00
24. Juillard, Inc., 840 Tennessee St., San Francisco, Calif.	535.06
25. Lauricella, Felix, Attorney at Law, 68 Post St., San Francisco, Calif.	225.00
26. Macy's, Stockton & O'Farrell Sts., San Francisco, Calif.	13.41
27. Marino, Edwin J., 1600 McKinnon Ave., San Francisco, Calif.	453.58
28. McKesson & Robbins, Inc., Box 836, Main P.O., San Francisco, Calif.	1,165.47
29. Millett, J. C., Co., 118 Sacramento St., San Francisco, Calif.	278.77
30. Montali, Ralph, Inc., 548-3rd St., San Francisco, Calif.	345.53
31. Monteverde & Parodi, 100 Broadway, San Francisco, Calif.	409.83
32. Pabst Sales Co., 475 Main St., San Francisco, Calif.	98.22
33. Pacific Coast Brands, 2700-18th St., San Francisco, Calif.	193.85
34. Pacific Gas & Electric Co., 245 Market St., San Francisco, Calif.	34.73
35. Pacific Tel & Tel Co., 444 Bush St., San Francisco, Calif.	16.32
36. Peters, Albert Co., The, 1544 Pine St., San Francisco, Calif.	106.25
37. Petri Distributing Co., 655-4th St., San Francisco, Calif.	58.04

38. Rathjen Bros., Inc., 135 Berry St., San Francisco, Calif.	\$ 768.24
39. Rathjen Co., Harry F., 2607 Cypress St., Oakland, Calif.	38.40
40. Safe Realty Co., 2344 Judah St., San Francisco, Calif.	156.25
41. Sanfilippo, Providenza and Venerando, 2320 Filbert St., San Francisco, Calif.	13,824.33
42. San Francisco Brewing Corporation, 490-10th St., San Francisco, Calif.	461.77
43. San Francisco Water Dept., 425 Mason St., San Francisco, Calif.	8.39
44. Sobel, Max, Wholesale Liquors, 240-2nd St., San Francisco, Calif.	691.80
45. Sosnick, Melvin Co., 801 McAllister St., San Francisco, Calif.	56.99
46. Sunset Scavenger Co., Ft. of Tunnel Ave. & Beatty Road, San Francisco, Calif.	1.50
47. Thanos, A. K., 480-2nd St., San Francisco, Calif.	982.88
49. Twin Peaks Distributing Co., 1050-25th St., San Francisco, Calif.	118.09
50. Vick's Distributing Co., 2341 San Pablo, Oakland, Calif.	237.52
51. Whately, William C., 228 Paul Ave., San Francisco, Calif. (disputed claim)	195.00
Total	\$26,107.14

Please Send Notices to: Board of Trade of San Francisco, 444 Market St., San Francisco, Calif.; Labor Commissioner of the State of California, 965 Mission St., San Francisco, Calif.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-4.

Liabilities on Notes or Bills Discounted Which Ought to Be
Paid by the Drawers, Makers, Acceptors, or Indorsers

None\$ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule A-5.

Accommodation Paper

None\$ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Oath to Schedule A

United States of America,
State of California,
City and County of San Francisco—ss.

I, Alfonso Paul Sanfilippo, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Subscribed and sworn to before me this 23rd day of April, 1954.

/s/ ADA V. PENNINGTON,
Notary Public in and for the City
and County of San Francisco,
State of California.

Schedule B.—Statement of All Property of Bankrupt

Schedule B-1.

Real Estate

None\$ 0.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-2.

Personal Property

A. Cash on hand. None	\$ 0.00
B. Negotiable and non-negotiable instruments and securities of any description, including stock in incorporated companies, interests in joint stock companies, and the like (each to be set out separately). None	0.00
C. Stock in trade. None	0.00
D. Household goods and furniture, household stores, wearing apparel and ornaments of the person.— Household goods and furniture owned by the bankrupt and his wife and located at their place of residence, 1320 Lombard St., San Francisco, and wearing apparel of the bankrupt. (Claimed Exempt.)	1,300.00
E. Books, prints and pictures.—Books, prints and pictures. (Claimed Exempt.)	50.00
F. Horses, cows, sheep, and other animals, (with number of each).—None	0.00
G. Automobiles and other vehicles.—1953 Ford Tudor V-8 automobile, subject to chattel mortgage of \$1,298.65 in favor of American Trust Co.	1,300.00
H. Farming stock and implements of husbandry.— None	0.00
I. Shipping and shares in vessels.—None	0.00
J. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated.— None	0.00
K. Patents, copyrights, and trade-marks.—None	0.00
L. Goods or personal property of any other description, with the place where each is situated.— None	0.00
Total	\$ 2,650.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-3.

Choses in Action

A. Debts due petitioner on open account.—On December 17, 1953, approximately \$900.00 was owed to the bankrupt, some of which had been assigned to the Acme Credit Bureau for collection. Remainder was turned over to the Board of Trade as part of the general assignment. How much has been collected is unknown to the bankrupt	Unknown
B. Policies of insurance.—National Service Life Insurance policy, \$2,500.00 face value; 20-year endowment; monthly premium approximately \$7.90; surrender value approximately \$480.00; subject to loan of approximately \$480.00. (Claimed Exempt.)	\$ 480.00
Group Life Insurance policy while employed by present employer	0.00
Automobile Insurance. Full coverage. \$100.00 deductible collision	0.00
C. Unliquidated claims of every nature, with their estimated value.—Property damage claim for \$100.00 arising out of automobile accident. Suit on file being handled by attorney for insurance company	100.00
Property damage claim for \$50.00 arising out of damage to parked car by Packard-Bell television service truck. Claim being handled by Safe Realty Co., 2344 Judah Street, San Francisco	50.00
D. Deposits of money in banking institutions and elsewhere.—On deposit in commercial account, American Trust Company, Marina Branch, San Francisco, Calif.	1.32
Total	\$ 631.32

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-4.

Property In Reversion, Remainder, or Expectancy, Including
Property Held in Trust for the Debtor or Subject to Any
Power or Right to Dispose of or to Charge

	Estimated Value of Interest
Interest in land.—None	\$ 0.00
Personal property.—None	0.00
Property in money, stock, shares, bonds, annuities etc.—None	0.00
Rights and powers, legacies and bequests.—None	0.00
Total	\$ 0.00

Property Heretofore Conveyed for Benefit of Creditors

Amount Realized
as Proceeds of
Property
Conveyed

Portion of debtor's property conveyed by deed of assignment, or otherwise, for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor.

Assets of business assigned to Board of Trade of San Francisco.

Attorney's fees: Sum or sums paid to counsel, and to whom, for filing fees or costs and for services rendered or to be rendered in this bankruptcy.

Bankrupt has paid to his attorneys, Messrs. Henry Gross and Francis P. Walsh, the sum of \$50.00 on account of court costs in these proceedings.

Total	\$ 0.00
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/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-5.

Property Claimed as Exempt From the Operation of the
Act of Congress Relating to Bankruptcy

[N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.]

	Valuation
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.	
National Service Life Insurance policy, \$2,500.00 face value, 20-year endowment, monthly premium approximately \$7.90, subject to loan of approximately \$480.00	\$ 480.00
(Claimed exempt under provisions of Sec. 454a, Title 3, 38 U.S.C. Annotated.)	
Property claimed to be exempt by State laws, with reference to the statute creating the exemption.	
Chairs, tables, desks and books located at residence of bankrupt. (Claimed exempt under Sec. 690.1 C.C.P. of the State of California)	200.00
Necessary household furniture, table and kitchen furniture and equipment, wearing apparel, ornaments of the person, beds, bedding and bedsteads belonging to bankrupt. (Claimed exempt under Sec. 690.2 C.C.P. of the State of California)	1,100.00
Books, prints and pictures. (Claimed exempt under Sec. 690.2 C.C.P. of the State of California)	50.00
Total	\$ 1,830.00

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Schedule B-6.

Books, Papers, Deeds, and Writings Relating to
Debtor's Business and Estate

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.—Books of accounts and records pertaining to the business and affairs of bankrupt are in possession of the Board of Trade of San Francisco, 444 Market Street, San Francisco, California.

Deeds.—None.

Papers.—Papers, bills, etc., pertaining to the business and affairs of bankrupt are in possession of the Board of Trade of San Francisco.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Oath to Schedule B

United States of America,
State of California,
City and County of San Francisco.—ss.

I, Alfonso Paul Sanfilippo, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

Subscribed and sworn to before me this 23rd day of April, 1954.

/s/ ADA V. PENNINGTON,
Notary Public in and for the City
and County of San Francisco,
State of California.

Summary of Debts and Assets

[From the statements of the debtor in Schedules A and B.]

Schedule A

1-a	Wages	\$	0.00
1-b (1)	Taxes due United States	(Unknown)	0.00
1-b (2)	Taxes due States		0.00
1-b (3)	Taxes due counties, districts and municipalities		0.00
1-c (1)	Debts due any person, including the United States, having priority by laws of the United States		0.00
1-c (2)	Rent having priority		0.00
2	Secured claims		2,011.45
3	Unsecured claims		26,107.14
4	Notes and bills which ought to be paid by other parties thereto		0.00
5	Accommodation paper		0.00
Schedule A, Total			\$28,108.59

Schedule B

1	Real Estate	\$	0.00
2-a	Cash on hand		0.00
2-b	Negotiable and non-negotiable instruments and securities		0.00
2-c	Stock in trade		0.00
2-d	Household goods		1,300.00
2-e	Books, prints, and pictures		50.00
2-f	Horses, cows, and other animals		0.00
2-g	Automobiles and other vehicles		1,300.00
2-h	Farming stock and implements		0.00
2-i	Shipping and shares in vessels		0.00
2-j	Machinery, fixtures, and tools		0.00
2-k	Patents, copyrights, and trade-marks		0.00
2-l	Other personal property		0.00
3-a	Debts due on open accounts	(Unknown)	0.00
3-b	Policies of insurance		480.00
3-c	Unliquidated claims		150.00
3-d	Deposits of money in banks and elsewhere		1.32

4	Property in reversion, remainder, expectancy or trust	0.00
5	Property claimed as exempt (\$1,830.00)	
6	Books, deeds and papers	0.00
	Schedule B, Total	\$ 3,281.32

/s/ ALFONSO PAUL SANFILIPPO,
Petitioner.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE
RELATIVE TO PETITION FOR REVIEW
OF REFEREE'S ORDER OF MAY 26, 1954

To Honorable Oliver D. Hamlin, United States Dis-
trict Judge for the Northern District of Cali-
fornia:

I, Burton J. Wyman, one of the referees in bank-
ruptcy of the above-entitled court and the referee
in charge of the above-entitled proceeding, hereby
respectfully certify and report:

On May 20, 1954, after due notice to interested
parties, the first meeting of creditors was held be-
fore the undersigned referee in bankruptcy.

At said meeting there were present, among others,
the bankrupt, in person, and Henry Gross, Esq., one
of the bankrupt's attorneys; Arthur P. Shapro,
Esq., on behalf of certain creditors; Max H. Mar-
golis, Esq., on behalf of certain creditors; John M.

England and Kal W. Lines, each of the latter being a candidate for the trusteeship herein.

During said meeting the following took place:

“The Referee: Election of trustee.

“Mr. Margolis: I have one claim for \$220.00, your Honor, that I vote for Kal W. Lines as trustee.

“The Referee: Any other nominations?

“Mr. Shapro: Yes, your Honor. I have 19 claims, totaling \$4,314.82, running to my office, and one claim for \$193.85 for Mr. England, all of which claims I vote for John M. England.

“Mr. Lines: I have three votable claims, your Honor, totaling \$293.46, which I vote for myself as trustee.

“The Referee: Do you want to check the claims?

“Mr. Margolis: Yes, your Honor.

“The Referee: We will pass the matter and give you a chance to check the claims.

“(Recess.)

“The Referee: Have you agreed to disagree?

“Mr. Shapro: Yes. We have agreed to disagree.

“Mr. Margolis: We have agreed, your Honor, that for Mr. Lines there are three claims in the amount of \$407.22, to which no objection is made.

“And the claims voted by Mr. Shapro for Mr. England to which there are no objections are: One claim for \$193.85.

“Now, there is a group of claims Mr. Shapro has presented to us for examination; they are all similar in form and I believe there are 19. Is that correct?

“Mr. Shapro: That is right.

“Mr. Margolis: And they were solicited by a letter—Mr. Shapro was fair enough to show it to us and we would like to show it to your Honor—by the Board of Trade.

“Mr. Shapro: We do not agree to the statement; we did not say they were solicited by the Board of Trade. I say this is the letter by which they were solicited. As to what that solicitation is, is a matter we are going to argue about in due course; I hope.

“The Referee: Sent out by the Board of Trade?

“Mr. Shapro: Members of the Creditors Committee; yes, sir.

“The Referee: And the Creditors Committee were all members of the Board of Trade?

“Mr. Shapro: I would like to offer some proof on that. I am not sure of it. I will not speak whereof I am not sure. Mr. Singer, will you be sworn, please?

“BENJAMIN SINGER

“called as a witness, sworn.

“The Referee: Q. What is your full name, Mr. Singer?

“A. Benjamin Singer.

“The Referee: Proceed.

“Mr. Shapro: Q. Mr. Singer, you are employed by Mr. Conners, the attorney for the Board of Trade of San Francisco. Is that right?

“A. That is correct.

“Q. I show you a form of letter dated April 23, 1954, on the letterhead of The Board of Trade of San Francisco, addressed to the Creditors of Al-

fonso Paul Sanfillippo, which purports to be signed by the Creditors' Committee composed of Falstaff Brewing Corp.; A. K. Thanos Co.; Rathjen Brothers, Inc.; Max Sobel Wholesale Liquors; and Haas Brothers. And I ask you if you know, will you tell the Court whether or not all these members of the Creditors Committee are members of the Board of Trade of San Francisco?

"A. I think they are.

"Q. Including Falstaff Brewing Corp.?

"A. Including Falstaff Brewing Corp.

"Q. 'Flastaff' then is a misprint here?

"A. I think the correct name is Falstaff.

"Q. All are members of the Board of Trade?

"A. Yes.

"Q. Mr. Singer, do you know of your own knowledge the circumstances under which this letter was prepared and transmitted?

"Mr. Margolis: I object on the ground that it is totally incompetent, irrelevant and immaterial.

"The Referee: What is the materiality?

"Mr. Shapro: The materiality of it, if your Honor please, is that I propose to show if I can get an answer from a subsequent question, I propose to show the transmission of this letter and its preparation in this form was at the express instance and request of the members of the Creditors' Committee.

"The Referee: The objection is sustained.

"Mr. Shapro: May I make an offer of proof, if your Honor please?

"The Referee: Surely.

“Mr. Shapro: At this time, I propose to prove through this witness that the letter in question and the form of claim, or proof of claim which has been offered for voting here which accompanied in each case the letter to the creditors involved, was prepared by this witness, dictated by him and mimeographed in the offices of the Board of Trade of San Francisco and transmitted by that office at the request of the five members of the Committee named in the letter. The designation of the power of attorney, or the names of the attorneys both in the letter and proof of claim and the letter of attorney for my office were so entered at the request of the five members of the Committee named in the letter.

“I also propose to show, if your Honor please, by Mr. Singer, that neither the Assignee for the Benefit of Creditors nor the attorney for the Assignee for the Benefit of Creditors, nor any member of the Board of Trade’s staff itself either suggested or in anywise indicated to the creditors to whom the letters were addressed or to the members of the Creditors’ Committee, which caused the letter to be sent, the designation of the attorneys-in-fact nor the powers of attorney in the claims referred to in the letter.

“I also propose to show by this witness, and I make it part of this offer to prove, that at no time prior to the announcement in court here by me of the candidate for trustee, whom I nominated, was the name of any candidate suggested or known to this witness or any of the members of the Creditors’

Committee or any member of the Board of Trade of San Francisco.

“I propose by my own testimony—I might as well make it part of this offer of proof—I propose by my own testimony to testify I consulted with no one, no member of the committee, no member of the Board of Trade or its legal staff or employees, with reference to the candidate for trustee, John M. England, whom I have nominated here.

“I also propose to show by my own testimony here that Mr. England, John M. England, has received no information even to this time of my intention to nominate him, nor has he any connection with or is employed by any member of the Creditors’ Committee or the Board of Trade of San Francisco.

“I also propose to show, if your Honor please, by my own testimony that the estate, this bankrupt estate, so far as within the power of the trustee nominated by me, if elected and the election is approved by the Court, would be administered fully, fairly, and honestly, and the fact that there was an assignment to the Secretary of the Board of Trade of San Francisco by the bankrupt within four months immediately preceding the bankruptcy would not in any way influence him in the administration of the estate, nor influence anyone, so far as I know, in the administration of the estate.

“I make the offer of proof as stated for the purposes indicated so your Honor may know, shall I call it the theory upon which I predicate the showing and, therefore, the offer of proof. I refer your

Honor—I am going back a long way—to the Max Belling case in Oakland, in which your Honor ruled; an exactly parallel case without exception except for the change of names. In other words, the powers of attorney in that case were running to our mutual friend, Clarence Shuey, I being in the same position Mr. Margolis is here. The nominee in those days, the nominee of Mr. Shuey, on the claims of Mr. Shuey, was William Dean. This, not being such solicitation as is prohibited by the Bankruptcy Act or the General Orders, the only basis on which the claims can be disqualified, not voted, is on the basis of being claims of persons who might have interests adverse to the trustee. Therefore, the claims are entirely proper for voting purposes; the nominee is not disqualified and, therefore, the claims should be permitted to vote.

“And the evidence I offer in the form of this offer of proof is competent, material and relevant to those issues.

“Mr. Margolis: I appreciate it is not a situation we might be confronted with after a receiver has been appointed, but I do feel, your Honor, there would be an adverse interest, in this, that the Board of Trade has been an assignee in this matter and no doubt has incurred some expense, for which they will make application for reimbursement. All the work that was done was done by Mr. Singer, an employee of the Board of Trade. In view of the fact that there was an assignment and it appears from the schedules and the testimony of the bankrupt that the Assignee would be required to account here,

it seems to me there is such a direct interest there that these claims cannot be voted for the purpose intended, notwithstanding the power run to the office of Shapro & Rothschild, because it appears to me to be an attempt to do indirectly what could not be done directly. The mere striking out of Mr. Conner's name on all the claims and the substitution of 'A. P. Shapro or A. B. Rothschild and/or the Office of Shapro & Rothschild,' I do not think clears that defect. The Board of Trade being the Assignee and the Committee being composed, as Mr. Singer has testified, of all members of the Board of Trade, can they accomplish the purpose here attempted to be accomplished? And, so, for the record, I object to the offer made by Mr. Shapro on the ground that it is incompetent, irrelevant and immaterial.

"Mr. Shapro: If your Honor please, may I answer counsel's argument?"

"The Referee: Yes.

"Mr. Shapro: In two respects. In the first place, the Statute, Sec. 69, requires the assignee for the benefit of creditors to account; it does not require him to account to the trustee; it requires him to account to this court. Therefore, if the Assignee for the Benefit of Creditors will, and I agree with counsel, he will have to account to this court for his administration of the receipts and disbursements under the assignment, the question of the trusteeship or the nominee who becomes trustee will have no bearing whatever on the accuracy or sufficiency of his accounting within the limits of the rulings of this Court.

“If I may, I should like to direct a question to Mr. Margolis in connection with this objection, so the record may be clear. I would like to know if it is your contention, Mr. Margolis, that if Mr. England’s election as trustee in this case were approved by this Court, that he would administer this estate other than impartially, fairly, and accurately?”

“Mr. Margolis: Absolutely not. But I would like to make this statement: You will stipulate that the Board of Trade is a non-profit organization?”

“Mr. Shapro: Yes.

“Mr. Margolis: Supported by members who pay dues for the expenses?”

“Mr. Shapro: They do.

“Mr. Margolis: I did not say the Board of Trade here would have to account, if it please your Honor, to the trustee, whosoever may be elected. But, on the basis of the answer to my question here, the Board of Trade has an interest in this matter to be reimbursed for any expenses it incurred. The Creditors’ Committee, being members of the Board of Trade, would have to make up any deficiency, it not being a profit making organization. Therefore, it seems to me it would be sufficient interest, where the Board of Trade took an active part in securing these powers of attorney, to disallow the election on the basis of the claims before this Court.

“Mr. Shapro: If your Honor please, I interrupted myself. I did not finish; I was just giving an answer to the second point, which counsel has raised again.

“The answer to the second point is this: The

allowance of expenses to the Assignee for the Benefit of Creditors, who was Mr. Hempy, the Secretary of the Board of Trade, is a matter strictly within your Honor's prerogative upon the filing of an application for allowance or reimbursement. If they were paid, your Honor would have to approve them; if they were not paid, your Honor would have to allow them. I take the position, if your Honor please, that the solicitation in this case, even if it were made by the Board of Trade, would not debar the claims from voting, for the reasons previously stated.

“Also, I take the position, if your Honor please, that this was not a solicitation by the Board of Trade except the Board of Trade's facilities and letterhead were used for the transmission of a letter, but, as I propose to prove by the testimony of the witness, it was at the express instructions of the people who signed it, the members of the Creditors' Committee. It is true there might be a difference between us with regard to the fact that the members of the Creditors' Committee are members of the Board of Trade. I take the position that if your Honor should disallow—this is quite important—if your Honor should, in the exercise of your discretion, disallow any item of expense or reimbursement, as the case may be, in the future, of the Assignee for the Benefit of Creditors, it would not be the Board of Trade of San Francisco nor any member of the Board of Trade of San Francisco who would suffer the financial loss. If such a thing should happen, of course I assume it won't, but if

it did happen, the one who would suffer would not be the Board of Trade; it would be Walter J. Hempy, the Assignee. The Board of Trade is not the Assignee in the case, nor are the members the assignee, nor is there any evidence, nor is it the fact that the members of the Creditors' Committee as such procured the assignment.

“I am fully familiar with the conditions. I feel I am fully familiar with the question of improper solicitation. That is one thing and the statute and the General Orders, which have the same force and effect, expressly put in certain methods of solicitation with which we are all familiar. We don't have that situation here. I reiterate, the only possible basis upon which the objection to the voting of these claims can be sustained as a matter of law—I believe it to be consistent not only with other courts' rulings, but your Honor's rulings in previous cases and that is why I am urging so strongly that entirely consistent with your Honor's previous rulings and the rulings of other courts in similar instances, that the only basis on which the claims can be debarred from voting or the objections sustained is on the ground that the nominee, if elected, would not fairly and honestly administer the estate. Counsel conceded such is not his contention. Therefore, we submit the nomination of Mr. England in this matter should be approved. Of course, I mean, if such should be your Honor's ruling if the facts are as I stated in my offer of proof, that before your Honor rules, the evidence I offer to prove, I should be permitted to prove.

“Mr. Margolis: We make no charge, your Honor, of improper solicitation. Mr. Shapro knows there was no indication of it when we went over these claims. But, I do feel there is an attempt here to do indirectly what cannot be done directly. The members of the Creditors’ Committee indicate in the letter that they are part and parcel of the Board of Trade of San Francisco:

“ ‘The undersigned Committee, appointed at the general meeting of creditors held at the Board last December, desires your co-operation in the selection of a competent trustee at the first meeting of creditors, and there is enclosed appropriate form of proof and letter of attorney with instructions attached.’

“Now, these individuals or companies or corporations are part and parcel of the Board of Trade of San Francisco and they use the facilities of the Board of Trade. I say again, any charges of the Assignee is a charge representing an adverse interest against the estate. I don’t mean it would be improper in any way. It would be an attempt, properly made, to be reimbursed for handling the matter during this assignment.

“We feel, under these circumstances, the claims should not be allowed to vote, when they were solicited in the manner indicated in the letter.

“Mr. Shapro: So far as I am concerned, I would feel our position was exactly the same if the Board of Trade, over the signature of one of its own

officers as distinguished from a member of the Creditors' Committee, solicited the claims under the same conditions, so long as they voted for a person who, so far as the record and the contention of counsel is concerned, would honestly and fairly administer the estate, other than the Assignee. We know a man cannot wear two hats. We have here, if I may say so, we have independent counsel. I state to your Honor that for over ten years past, personally I have represented practically every one of these liquor houses. We have Mr. England, whose integrity so far as the administration of the estate is concerned is conceded. I say to your Honor, under those conditions, these nineteen creditors' claims approximately totalling \$5,000.00, should not be disenfranchised in favor of three creditors for \$400.00.

"I have just made my offer of proof and to the offer of proof, Mr. Margolis has an objection pending.

"The Referee: Mr. Margolis' objection to the offer of proof goes to Mr. Shapro's testimony also, if he is allowed to give it?

"Mr. Margolis: That is correct.

"The Referee: May we have the letter in evidence?

"Mr. Shapro: Oh, surely.

"The Referee: Who is offering it?

"Mr. Shapro: We can make it a joint exhibit.

"The Referee: Joint Exhibit No. 1.

"(The letter referred to above was admitted in evidence as Joint Exhibit No. 1.)

“The Referee: The matter may be submitted.

“(Continued to May 27, 1954—10:00 a.m.)”

On May 26, 1954, the undersigned referee in bankruptcy signed and filed the order which is complained of in the petition for review that was filed herein on June 7, 1954, and is as follows:

“Come now the following creditors of the above estate, viz.:

- “Falstaff Brewing Corp.,
- “Goebel Brewing Company of California,
- “Monteverde & Parodi, Inc.,
- “Ralph Montali, Inc.,
- “Pacific Gas & Electric Company,
- “Pabst Brewing Company,
- “Harry F. Rathjen Co.,
- “San Francisco Brewing Corporation,
- “Melvin Sosnick Company,
- “Twin Peaks Distributing Co.,
- “Vick’s Distributing Company,
- “N. Cervelli & Company,
- “California Wine Association,
- “Brown & Bigelow,
- “Carlo Arbasetti,
- “The Albert Peters Co.,

and respectfully represent:

“That heretofore and on the 26th day of May, 1954, Honorable Burton J. Wyman, Referee in Bankruptcy herein, made and entered herein that certain ‘Summary of Record, Findings of Fact and Conclusions of Law Relative to Contest Over Elec-

tion of Bankruptcy Trustee' and Orders thereon, a full, true and correct copy of which is hereto annexed, marked 'Exhibit "A,"' and hereby expressly referred to and made part hereof; that the aforesaid Referee's orders so made and entered herein on the said 26th day of May, 1954, were and are erroneous and contrary to law in each and all of the following particulars:

“(1) That neither said Referee's orders nor his Findings and/or Conclusions therein contained are supported by, and that said Referee's said orders, Findings and/or Conclusions therein contained are contrary to, the records, papers and files herein.

“(2) That of the said Findings of Fact made by said Referee, those numbered (5) and (8) are wholly unsupported by the evidence adduced before said Referee and are contrary to the evidence sought to be introduced by and offered by your Petitioners in support of John M. England, the candidate of your Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

“(3) That of the said purported Findings of Fact made by said Referee, those numbered (9) and (10) are, in effect, conclusions of the said Referee and not findings of fact and, in any event, are not supported by the evidence received by said Referee in Bankruptcy upon the issues involved herein and are contrary to the evidence sought to be introduced and offered by your Petitioners in support of J. M. England, the candidate of your

Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

“(4) That the Conclusions of Law made by said Referee and numbered (1), (2), (3) and (4) are, and each of them is, contrary to law, is unsupported by valid findings of fact and/or is unsupported by the records, papers and files herein.

“(5) That said Referee in Bankruptcy improperly refused to accept evidence offered by your Petitioners and/or contained in the offer of proof made by your Petitioners in support of their said voting of said claims for said Trustee and improperly sustained objections thereto, notwithstanding the fact that the grounds of said objections were and are untenable in law and not based on any competent evidence adduced by said Objectors and contained in the records of this proceeding.

“(6) That by reason of the aforesaid rulings and/or orders of said Referee in Bankruptcy your Petitioners were disenfranchised and were not permitted to vote for the candidate of their selection as Trustee of the estate of the above-named Bankrupt notwithstanding the fact that it was conceded by the Objectors to the voting of the said claims of your Petitioners as aforesaid, that if the election of your Petitioners' said candidate, John M. England, as such Trustee, were to be approved by this Court that said John M. England would administer said estate impartially, fairly, and accurately (See Reporter's Transcript of hearing, May 20, 1954,

page 8, lines 5-13); and notwithstanding the fact that there was no showing made in support of the said objections interposed to the voting of your Petitioners' said claims for said Trustee; that said Petitioners, or any of them, or their attorney in fact had any interest or was likely to have an interest adverse to the said bankrupt estate and/or of any of the creditors thereof.

“(7) That it affirmatively appears from the evidence received by said Referee in Bankruptcy and from the evidence offered by your Petitioners and improperly, as aforesaid, rejected by said Referee in Bankruptcy that contrary to said Referee's purported Finding No. (9), it was not the intent of, nor was any effort whatever made by or on the part of the said Creditors' Committee, acting for said Board of Trade, indirectly or otherwise to keep, if possible, some or any sort of control over the assets of the estate of the above-named Bankrupt to the extent of said purported Finding No. (9) set forth to any extent or at all; and that it affirmatively appears therefrom that the selection of the nominee for Trustee of the estate voted for by your Petitioners, including the members of said Creditors' Committee and other members of the Board of Trade and other non-members of the Board of Trade was made solely by your Petitioners' attorney in fact, Arthur P. Shapro, Esq., without prior consultation with or instructions or advice from said Creditors' Committee, the said Board of Trade, or any member, officer or employee thereof.

“Wherefore, your Petitioners pray that the

aforesaid Referee's orders made and entered herein on the said 26th day of May, 1954 (a true copy of which is hereto annexed as 'Exhibit A' hereof), may be, by the Judge of the above-entitled Court, reviewed and reversed; and that said Referee in Bankruptcy be by the said Judge directed to overrule the objections to and to admit and receive the evidence offered by your Petitioners in support of the votability of their said claims, and in the absence of contrary proof thereon directing said Referee to approve the election of said John M. England as Trustee of the above estate in lieu and instead of Cal W. Lines, all after due proceedings to be had herein in accordance with Section 39(c) of the Bankruptcy Act; or for such other, further and different order or relief as to this Honorable Court may seem just in the premises.

"FALSTAFF BREWING CORP.,

"GOEBEL BREWING COMPANY OF CALIFORNIA,

"MONTEVERDE & PARODI, INC.,

"RALPH MONTALI, INC.,

"PACIFIC GAS & ELECTRIC COMPANY,

"PABST BREWING COMPANY,

"HARRY F. RATHJEN CO.,

"SAN FRANCISCO BREWING CORPORATION,

"MELVIN SOSNICK COMPANY,

"TWIN PEAKS DISTRIBUTING CO.,

"VICK'S DISTRIBUTING COMPANY,

"N. CERVELLI & COMPANY,

"CALIFORNIA WINE ASSOCIATION,

“BROWN & BIGELOW,
“CARLO ARBASSETTI,
“THE ALBERT PETERS CO.,
“Petitioners;

“By /s/ ARTHUR P. SHAPRO,
“Their Attorney-in-Fact.

“United States of America,
“Northern District of California,
“City and County of San Francisco—ss.

“Arthur P. Shapro, being first duly sworn, deposes and says:

“That he is one of the attorneys for the Petitioners named herein, and as such is duly authorized to and does make this verification on behalf of said Petitioners; that he has read said Petition, knows the contents thereof, and hereby makes solemn oath that the statements therein contained are true, according to the best of his knowledge, information and belief.

“/s/ ARTHUR P. SHAPRO.

“Subscribed and sworn to before me this 7th day of June, 1954.

“[Seal] /s/ FRANCES R. WIENER,
“Notary Public in and for the City and County of San Francisco, State of California.”

The aforesaid complained of order, a copy of which was, and is, attached to the aforesaid petition for review and which said order is therein referred to as “Exhibit ‘A,’ ” is as follows:

EXHIBIT A

In the Southern Division of the United States
District Court for the Northern District of
California

No. 42878—In Bankruptcy

In the Matter of:

ALFONSO PAUL SANFILIPPO,

Bankrupt.

SUMMARY OF RECORD, FINDINGS OF FACT
AND CONCLUSIONS OF LAW RELATIVE
TO CONTEST OVER ELECTION OF
BANKRUPTCY TRUSTEE

This matter comes before the court under the following circumstances:

(1) On December 17, 1953, the above-named Alfonso Paul Sanfilippo made a general assignment for the benefit of creditors in which said assignment Walter J. Hempy was named as the assignee.

(2) Thereafter certain action was and/or certain actions were taken by and/or through said Walter J. Hempy, characterized as aforesaid, with reference and/or relative to the affairs and/or property of said Alfonso Paul Sanfilippo, at certain meetings held at the Board of Trade of San Francisco and at which said meetings certain members and/or employees of the Board of Trade were present and participated.

(3) On April 16, 1954, said Alfonso Paul Sanfilippo filed in the above-entitled court his voluntary petition to be adjudged a voluntary bankrupt.

(4) Thereafter, and on April 16, 1954, Alfonso Paul Sanfilippo was adjudged a bankrupt, by the above-entitled court and the above-entitled bankruptcy proceeding was referred, primarily, to the undersigned referee in bankruptcy to take such further proceedings therein as are required and permitted by the Bankruptcy Act.

(5) On, or about, April 23, 1954, a certain form letter was prepared and copies thereof mailed to creditors, the facilities of said Board of Trade and/or its membership being used in the preparation of said letter.

(6) On May 20, 1954, the first meeting of creditors, after due notice to interested parties had been given, was held, before the undersigned referee in bankruptcy, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, pursuant to, and in accordance with, said notice.

(7) During the course of said meeting certain claims were voted by Arthur P. Shapro, Esq., for John M. England, and certain other claims were voted by Kal W. Lines, on behalf of himself, and a recess thereafter was granted to permit the opposing candidates and/or their respective representatives to examine the claims for the purpose of satisfying themselves as to the validity of each of said sets of claims and to give the respective candi-

dates and/or their respective representatives opportunities, later, in open court, if they so chose to do, to object to the voting of any of such claims.

After the court had reconvened for the purpose of hearing any objections on the part, or in behalf of, any of the contesting parties, and to determine who should be selected as trustee, certain evidence, oral and documentary, was offered and received and, the matter having been submitted for decision, the court, now being advised fully in the premises, so far as the record in the aforesaid bankruptcy proceeding discloses, finds:

(1) That at the time said Walter J. Hempy was named in the aforesaid assignment for benefit of creditors as the assignee, said Walter J. Hempy, then was, ever since has been, and now is, the secretary of the Board of Trade of San Francisco.

(2) That, at the time of the filing of the initial petition in bankruptcy in the above-entitled court there was in the hands of Walter J. Hempy, as the assignee named in said assignment and/or in the office, or a bank account under the control of said Board of Trade, the sum of \$4,054.88 (according to the verified Statement of Affairs of Alfonso Paul Sanfilippo, the now bankrupt herein).

(3) That an exact photostatic copy of the letter hereinabove referred to is as follows:

BOARD OF TRADE OF SAN FRANCISCO

AN ASSOCIATION OF WHOLESALE, MANUFACTURERS AND DISTRIBUTORS OF
NORTHERN AND CENTRAL CALIFORNIA

BOARD OF TRADE BUILDING
444 MARKET STREET

SAN FRANCISCO 11, CALIF.

April 23 1954

OFFICERS

H. S. MARGOTTS
PRESIDENT

D. M. HESBER
FIRST VICE-PRESIDENT

KARL J. WEBER
SECOND VICE-PRESIDENT

GEORGE W. BRANLARD
RESERVING VICE-PRESIDENT

DAVID A. BERONHO
TREASURER

PAUL M. ANDERSON
ASSISTANT TREASURER

WALTER J. HEDAPP
RECORDS

JAMES M. CONNORS
ATTORNEY

PLEASE REPLY ATTENTION OF

DIRECTORS

PAUL M. ANDERSON
WALTON D. BERRY

A. P. SALEY
DAVID A. BERONHO

D. J. BOSCHART
PETER FOLGER

JEROME J. FRIEDBERG
M. S. MARGOTTS

JULIUS HARR
D. M. HESBER

H. S. MILLAR
ERNEST H. PRICE

KARL J. WEBER

RE: Alfonso Paul Sanfillippo
STAG LIQUORS
6273 3rd St., San Francisco

TO THE CREDITORS:

The above party has filed a bankruptcy petition, and all creditors are now required to file proofs of their claims with the Referee in Bankruptcy.

The undersigned Committee, appointed at the general meeting of creditors held at the Board last December, desires your cooperation in the selection of a competent trustee at the first meeting of creditors, and there is enclosed appropriate form of proof and letter of attorney with instructions attached.

It is essential that itemized invoices, as well as an itemized statement, be annexed to the proof and that the executing party personally appear before the Notary Public.

The undersigned Committee has designated the law firm of Shaprow & Rothschild to represent it in the bankruptcy proceedings and you will note that their names appear in the within letter of attorney.

Please give the enclosure prompt attention and return it to the undersigned Committee in care of the Board of Trade.

Yours very truly,

CREDITORS' COMMITTEE
composed of
FLASTAFF BREWING CORP.
A. K. THANOS CO.
RATHJEN BROTHERS, INC.
MAX SOBEL WHOLESALE LIQUORS
HAAS BROTHERS

Encl.
53-1664

*Vol 3. 20.1
5-20-54*

(4) That each member of the aforesaid Creditors' Committee, at the time said letter was prepared and sent to creditors, as aforesaid, was a member of the aforesaid Board of Trade.

(5) That all the activities of the membership of said Creditors' Committee, in connection with the aforesaid assignment and the aforesaid affairs and/or property of said Alfonso Paul Sanfilippo, after the making, by said Alfonso Paul Sanfilippo, of the aforesaid assignment, were as members of said Board of Trade and not merely as creditors of said Alfonso Paul Sanfilippo.

(6) That there were nineteen (19) claims voted by Arthur P. Shapro, Esq., aggregating the sum of \$4,314.82, which were objected to by or on behalf of Kal W. Lines and the creditors represented by him, each of which had been "filled out" on a claim form used by said Board of Trade and which, as originally printed, had the following wording, at the top thereof:

"Under within Letter of Attorney, all dividends should be forwarded to James M. Conners, 444 Market Street, San Francisco, Calif., Attorney for Claimant";

that the aforesaid quoted language had been obliterated by the use of numerous typed letter "exes" and in the place of said obliterated words, the following wording was substituted in typewriting at the top of said claim forms:

"Under within Letter of Attorney, all divi-

dends should be forwarded to Shapro & Rothschild, 155 Montgomery Street, San Francisco, California, Attorneys for Claimant.”

(7) That from each of the last mentioned nineteen (19) claims (which as originally had printed, on each of the forms especially used by the Board of Trade and/or its members in the solicitation of claims to be voted for trustees in bankruptcy, and for other purposes, the following language appeared, “Claimant authorizes James M. Connors and/or Vernon D. Stokes * * * or either of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid * * * and in his or its name * * * to vote for a trustee, or trustees * * *,”) had been stricken the last above quoted language, by the use of a heavy black, obliterating line, the words “James M. Connors and/or Vernon D. Stokes” and in their stead had been typed the words “and/or Shapro & Rothschild.”

(8) That Walter J. Hempy, named in the aforesaid assignment for the benefit of creditors in all his activities in connection with the aforesaid affairs and property of said Alfonso Paul Sanfilippo were performed, not as an assignee on his own behalf, but as the Secretary of said Board of Trade and in truth and in fact acting, in said assignment, wherein he was named assignee, for and/or on behalf of said Board of Trade and/or the membership of said Board of Trade, and not otherwise.

(9) That in causing to be prepared and sent out the aforesaid letter and each of the aforesaid nine-

teen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade.

(10) That, in the light of all the circumstances, it would not be, nor is it, for the best interest of all the creditors of Alfonso Paul Sanfilippo, and particularly the creditors who, or which, are not members of said Board of Trade to count the claims procured in the maner, and under the circumstances aforesaid, in voting for any candidate for trustee in the above-entitled manner.

(11) That John M. England has but one (1) claim, in the sum of \$193.88, favoring him as trustee, to which no valid objection has been made.

(12) That Kal W. Lines, so far as number was, and is, concerned herein, has three (3) claims aggregating the sum of \$375.65, favoring him, as trustee herein, to which no valid objection has been made, and that none of such claims is that of any member of said Board of Trade.

(13) That Kal W. Lines, so far as amount was, and is concerned herein, has five (5) claims (including the three (3) last mentioned claims) in the total sum of \$407.21, favoring him, as trustee herein, to

which no valid objection has been made, and that none of said claims is that of any member of said Board of Trade.

(14) That nothing herein contained is intended to be construed, nor is it, any reflection whatsoever, on said John M. England to act as a trustee in bankruptcy.

Because of the state of the record herein and, in the light of all the circumstances shown by said record, the court concludes:

(1) That Kal W. Lines has a majority, both in number and in amount of the claims of creditors which are entitled to be counted herein to be voted for trustee.

(2) That, to allow any of the aforesaid nineteen (19) claims to be voted for any candidate for the herein trusteeship would be for the court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the bankruptcy court of this jurisdiction.

(3) That, the "offers to prove" made by counsel designated in the aforesaid letter to represent the aforesaid Creditors' Committee should be denied and the objections made by the representative of Kal W. Lines, to each of the aforesaid nineteen (19) claims, so far as voting purposes are concerned herein, should be sustained.

(4) That Kal W. Lines alone should be appointed trustee in bankruptcy of the bankruptcy

estate of the above-named bankrupt, not to qualify as such, however, until a bond has been fixed and approved by the court, counsel designated in said letter to have not to exceed five (5) days from date hereof within which to suggest to the court what the amount of such bond should be.

It, Therefore, Hereby Is Ordered :

(1) That the "offers to prove" made by counsel designated in the aforesaid letter to represent the aforesaid Creditors' Committee be, and said "offers to prove" are, and each one thereof is, Denied and the objections made by the representative of Kal W. Lines, to each of the aforesaid nineteen (19) claims, so far as voting purposes are concerned herein, are, and each one of said objections is, Sustained, and

(2) That Kal W. Lines alone be, and he is, appointed trustee in bankruptcy of the bankruptcy estate of the above-named bankrupt, not to qualify as such, however, until a bond has been fixed and approved by the court, counsel designated in said letter to have not to exceed five (5) days from date hereof within which to suggest to the court what the amount of such bond should be.

Dated: May 26, 1954.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

Referee's Notes

Because the following excerpts from some of the numerous decisions (examined by the undersigned referee in bankruptcy in dealing with the situation presented) may be of aid to your Honor in considering and determining the question raised by the aforesaid petition for review, they are included in this certificate and report without any comment:

“The theory of the bankrupt law is that the assets of a bankrupt shall be honestly collected and honestly disbursed among all the creditors. Neither the bankrupt himself, nor his attorney, nor an assignee, nor his attorney, can be permitted to control the selection of a trustee. If creditors knowingly join with the bankrupt or his attorney, or with an assignee or his attorney, in an effort to do what it repeatedly has been decided they may not do, the simplest and most obvious way to defeat their purpose is to reject their selection of trustee, and permit the creditors who are not in the combination to make the selection.”

In re Stowe

(D.C., N.D., Calif.) 235 F. 463, 464 (Opinion by Dooling, District Judge).

“The trustee represents every creditor,”

In re Lewensohn

(C.C.A. 2) 121 F. 538, 539, “not a majority, however great.”

In re Columbia Iron Works

(D.C., Mich.) 142 F. 234, 237.

“There is nothing in the Bankruptcy Act making the selection of a trustee by the creditors absolute at all events.”

In re Austin Resort & Land Co.

(D.C., N.D., Calif.) 12 F. Supp. 459, 462

(Opinion by St. Sure, District Judge.)

“The referee is vested with authority by the act to preside over the election of a trustee and to say what creditors have the right to vote. It would be useless for him to do so if he lacked the further authority to set aside a result inimical to the best interest of all the creditors and contrary to the general principles underlying the orderly administration of the bankruptcy law.”

In re Leader Mercantile Co.

(C.C.A. 5) 36 F. (2d) 745, 746.

“As stated In Matter of Rosenfeld-Goldman, D.C. 228 F. 921, at page 923:

“ ‘The actual administration of bankrupt estates is, under the present law, left largely to the Referees. It is the settled practice of this court not to disturb their acts in administrative matters—of which the election of a trustee is a typical example—unless a plain and injurious error of law or abuse of discretion is shown (Emphasis supplied). See also Sloan’s Furriers, Inc., v. Bradley, 6 Cir., 146 F. 2d 757.’

“Therefore, unless the allowance or disallowance of a claim was so plainly wrong, that an election

based on the Referee's decision was manifestly unfair, his decision must stand."

In re Deena Woolen Mills

(D.C., Me.) 114 F. Supp. 260, 267, 268.

"* * * it is the settled practice of this court not to disturb the acts of the referee 'in administrative matters—of which the election of a trustee is a typical example—unless a plain and injurious error of law or abuse of discretion is shown.'"

In re Austin Resort & Land Co., *supra*, p. 462.

"It is held that the action of the referee in bankruptcy in administrative matters is entitled to great weight. See in re Jaffee (D.C.) 272 F. 899; In re Wink (D.C.) 206 F. 348.

"The discretion exercised by the referee in such circumstances should not be lightly overruled."

In re Scott

(D.C., Mich.) 53 F. (2d) 89, 92.

"The term 'discretion' denotes the absence of a hard and fast rule. The *Styria v. Morgan*, 186 U.S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Langnes v. Green

282 U. S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520, 526.

“* * * the Referee has discretion as to how much argument or testimony he will hear in support or opposition to a claim before election.”

In re West Hills Memorial Park

(D.C., Ore.) 41 F. Supp. 169, 170 (Opinion by Fee, then District Judge, now Circuit Judge).

“Discretion,” as defined in *Delno v. Market St. Ry. Co.* (C.C.A. 9) 124 F. (2d) 965, 967:

“ ‘The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.’ 1 Bouv. Law Dict., Rawles’ Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set aside on appeal* except when there is an abuse of discretion * * *. Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial

*“In passing upon a petition for review of a referee’s order, ‘The proceeding is in substance an appeal from the court of bankruptcy—i.e., the referee—to the District Court.’ In re Pearlman (C.C.A.) 16 F. (2d) 20, 21.”

In re Big Blue Min. Co.

(D.C., N.D., Calif.) 16 F. Supp. 50, 51 (Opinion by St. Sure, District Judge).

court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.”

See, also, *In re Maine State Raceways*
(D.C., Me.) 105 F. Supp. 620, 628.

Papers Handed Up Herewith

Handed up herewith, as parts of this certificate and report, are the following papers:

1. Petition for Review;
2. Summary of Record, Findings of Fact, etc.;
3. Reporter's Transcript; and
4. Envelope containing the aforesaid Nineteen (19) claims and Form Letter.

Dated: July 22, 1954.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed May 26, 1954, Referee.

[Endorsed]: Filed July 22, 1954, U.S.D.C.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Come now the following creditors of the above estate, viz:

Falstaff Brewing Corp.,
Goebel Brewing Company of California,
Monteverde & Parodi, Inc.,
Ralph Montali, Inc.,
Pacific Gas & Electric Company,
Pabst Brewing Company,
Harry F. Rathjen Co.,
San Francisco Brewing Corporation,
Melvin Sosnick Company,
Twin Peaks Distributing Co.,
Vick's Distributing Company,
N. Cervelli & Company,
California Wine Association,
Brown & Bigelow,
Carlo Arbasetti,
The Albert Peters Co.,

and respectfully represent:

That heretofore and on the 26th day of May, 1954, Honorable Burton J. Wyman, Referee in Bankruptcy herein, made and entered herein that certain "Summary of Record, Findings of Fact and Conclusions of Law Relative to Contest over Election of Bankruptcy Trustee" and Orders thereon, a full, true and correct copy of which is hereto annexed, marked "Exhibit 'A,'" and hereby expressly re-

ferred to and made part hereof; that the aforesaid Referee's orders so made and entered herein on the said 26th day of May, 1954, were and are erroneous and contrary to law in each and all of the following particulars:

(1) That neither said Referee's orders nor his Findings and/or Conclusions therein contained are supported by, and that said Referee's orders, Findings and/or Conclusions therein contained are contrary to the records, papers and files herein.

(2) That of the said Findings of Fact made by said Referee, those numbered (5) and (8) are wholly unsupported by the evidence adduced before said Referee and are contrary to the evidence sought to be introduced by and offered by your Petitioners in support of John M. England, the candidate of your Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

(3) That of the said purported Findings of Fact made by said Referee, those numbered (9) and (10) are, in effect, conclusions of the said Referee and not findings of fact and, in any event, are not supported by the evidence received by said Referee in Bankruptcy upon the issues involved herein and are contrary to the evidence sought to be introduced by and offered by your Petitioners in support of J. M. England, the candidate of your Petitioners for election as Trustee of the above estate, and said evidence was refused by said Referee in Bankruptcy.

(4) That the Conclusions of Law made by said Referee and numbered (1), (2), (3) and (4) are, and each of them is, contrary to law, is unsupported by valid findings of fact and/or is unsupported by the records, papers and files herein.

(5) That said Referee in Bankruptcy improperly refused to accept evidence offered by your Petitioners and/or contained in the offer of proof made by your Petitioners in support of their said voting of said claims for said Trustee and improperly sustained objections thereto, notwithstanding the fact that the grounds of said objections were and are untenable in law and not based upon any competent evidence adduced by said Objectors and contained in the records of this proceeding.

(6) That by reason of the aforesaid rulings and/or orders of said Referee in Bankruptcy your Petitioners were disenfranchised and were not permitted to vote for the candidate of their selection as Trustee of the estate of the above-named Bankrupt notwithstanding the fact that it was conceded by the Objectors to the voting of the said claims of your Petitioners as aforesaid, that if the election of your Petitioners' said candidate, John M. England, as such Trustee, were to be approved by this Court that said John M. England would administer said estate impartially, fairly, and accurately (See Reporter's Transcript of hearing, May 20, 1954, page 8, lines 5-13); and notwithstanding the fact that there was no showing made in support of the said objections interposed to the voting of your Petitioners' said

claims for said Trustee; that said Petitioners, or any of them, or their attorney in fact had any interest or was likely to have an interest adverse to the said bankrupt estate and/or of any of the creditors thereof.

(7) That it affirmatively appears from the evidence received by said Referee in Bankruptcy and from the evidence offered by your Petitioners and improperly, as aforesaid, rejected by said Referee in Bankruptcy that contrary to said Referee's purported Finding No. (9), it was not the intent of, nor was any effort whatever made by or on the part of the said Creditors Committee, acting for said Board of Trade, indirectly or otherwise to keep, if possible, some or any sort of control over the assets of the estate of the above-named Bankrupt to the extent of said purported Finding No. (9) set forth to any extent or at all; and that it affirmatively appears therefrom that the selection of the nominee for Trustee of the estate voted for by your Petitioners, including the members of said Creditors Committee and other members of the Board of Trade and other non-members of the Board of Trade was made solely by your Petitioners' attorney in fact, Arthur P. Shapro, Esq., without prior consultation with or instructions or advice from said Creditors Committee, the said Board of Trade, or any member, officer or employee thereof.

Wherefore, your Petitioners pray that the aforesaid Referee's orders made and entered herein on the said 26th day of May, 1954 (a true copy of which

is hereto annexed as "Exhibit A" hereof), may be, by the Judge of the above-entitled Court, reviewed and reversed; and that said Referee in Bankruptcy be by the said Judge directed to overrule the objections to and to admit and receive the evidence offered by your Petitioners in support of the votability of their said claims, and in the absence of contrary proof thereon directing said Referee to approve the election of said John M. England as Trustee of the above estate in lieu and instead of Cal W. Lines, all after due proceedings to be had herein in accordance with Section 39(c) of the Bankruptcy Act; or for such other, further and different order or relief as to this Honorable Court may seem just in the premises.

FALSTAFF BREWING CORP.,
GOEBEL BREWING
COMPANY OF CALIFORNIA,
MONTEVERDE & PARODI,
INC.,
RALPH MONTALI, INC.,
PACIFIC GAS & ELECTRIC
COMPANY,
PABST BREWING COMPANY,
HARRY F. RATHJEN CO.,
SAN FRANCISCO BREWING
CORPORATION,
MELVIN SOSNICK
COMPANY,
TWIN PEAKS
DISTRIBUTING CO.,

VICK'S DISTRIBUTING
 COMPANY,
 N. CERVELLI & COMPANY,
 CALIFORNIA WINE
 ASSOCIATION,
 BROWN & BIGELOW,
 CARLO ARBARETTI,
 THE ALBERT PETERS CO.,
 Petitioners.

By /s/ ARTHUR P. SHAPRO,
 Their Attorney-in-Fact.

United States of America,
 Northern District of California,
 City and County of San Francisco—ss.

Arthur P. Shapro, being first duly sworn, deposes and says:

That he is one of the attorneys for the Petitioners named herein, and as such is duly authorized to and does make this verification on behalf of said Petitioners; that he has read said Petition, knows the contents thereof, and hereby makes solemn oath that the statements therein contained are true, according to the best of his knowledge, information and belief.

/s/ ARTHUR P. SHAPRO.

Subscribed and sworn to before me this 7th day of June, 1954.

[Seal] /s/ FRANCES R. WIENER,
Notary Public in and for the City of County of San
Francisco, State of California.

[Exhibit A attached is identical to Exhibit A attached to the Certificate and Report of Referee.]

Receipt of Copy acknowledged.

[Endorsed]: Filed June 7, 1954, Referee.

[Endorsed]: Filed July 22, 1954, U.S.D.C.

Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
PETITION FOR REVIEW

Good cause appearing therefor, now on motion of Messrs. Shapro & Rothschild, attorneys for certain creditors herein,

It Is Hereby Ordered that the creditors whose claims were disallowed for voting purposes by the orders of the undersigned Referee in Bankruptcy herein made on May 26, 1954, and each of them, may have to and including the 7th day of June, 1954, within which to file herein their Petition for review of said last-mentioned Orders.

Dated at San Francisco in Said District this 4th day of June, 1954.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 4, 1954, Referee.

[Endorsed]: Filed July 18, 1955, U.S.D.C.

[Title of District Court and Cause.]

ORDER STAYING ADMINISTRATION
PENDING REVIEW

Certain of the creditors of the above-named Bankrupt having this day filed herein their Petition for Review of those certain orders made and entered herein by the undersigned Referee in Bankruptcy on the 26th day of May, 1954, and their motion to that effect having heretofore been made in open Court on behalf of said Petitioners by Arthur P. Shapro, Esq., one of their attorneys, and having been granted by this Court conditional upon such filing, and good cause appearing therefor,

It Is Hereby Ordered that from and after his qualification as Trustee of the estate of the above-named Bankrupt, Kal W. Lines, the person appointed as such Trustee by the undersigned Referee in Bankruptcy by virtue of the orders hereinabove referred to, shall take no further steps or proceedings in the administration of said Bankrupt's estate pending the final determination of said Petition for

Review other than, if necessary, to file an inventory of the motor vehicles scheduled by said Bankrupt for the purpose of appraisal thereof; and

It Is Further Ordered that the premium payable on the bond of said Kal W. Lines as such Trustee shall be charged against and shall be paid by the estate of the above-named Bankrupt, regardless of any determination that may be made with respect to said Petition for Review of the undersigned's said orders dated the 26th day of May, 1954.

Dated at San Francisco in said District this 7th day of June, 1954.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 7, 1954, Referee.

[Endorsed]: Filed July 18, 1954, U.S.D.C.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

Henry Gross, being first duly sworn, deposes and says:

That he is one of the attorneys for the above-named bankrupt; that on or about the 15th day of April, 1954, your affiant was contacted by the above-named bankrupt relative to the advisability of filing

a voluntary petition in bankruptcy; that said bankrupt told your affiant that on the 17th day of December, 1953, he had made a general assignment of all of the assets of his business to the Board of Trade of San Francisco for the benefit of his creditors; that said assignee had liquidated said business and had in its possession as a result of said liquidation the sum of \$4,054.88 for distribution to his creditors; that he had no desire to file a petition in bankruptcy if all of his creditors would accept a pro rata share of the money so held by the Board of Trade and release him from any further obligation;

That among the creditors of said bankrupt were Providenza and Venerando Sanfilippo, the mother and father of said bankrupt, who had a joint and several claim against him for money loaned in the amount of \$13,824.33; that said bankrupt felt that his parents should share pro rata with his other creditors in any distribution of moneys by the Board of Trade; that after said conference between the bankrupt and your affiant and while the bankrupt was in his office, your affiant contacted William C. Drinnen, of the Board of Trade of San Francisco, in order to ascertain if the bankrupt would be granted a full release by his creditors without filing a voluntary petition in bankruptcy; however, your affiant was advised by the said William C. Drinnen that the creditors who were represented by the Board of Trade of San Francisco and/or who were members thereof, would not grant a full release to the bankrupt unless his parents waived their right

to participate in any dividend to be declared by the Board of Trade on the \$4,054.88 held by it. That in an attempt to ascertain the reason why the said creditors would refuse to grant the bankrupt a release unless his parents would waive their right to participate in said dividend, your affiant asked the said William C. Drinnen if the creditors questioned the fact that the bankrupt's parents actually had loaned him the money; that in reply to said questioning the said William C. Drinnen told your affiant that there was no question but that they had loaned him money in the approximate sum of \$15,000.00 to enable him to go into business, and that while the creditors felt that \$13,824.33 was more than the bankrupt still owed his parents on said obligation, still the amount of said indebtedness was not less than within \$1,000.00 of said amount; that your affiant was advised by Mr. Drinnen, however, that even if the amount of his parents' claim was agreed upon between the parents and the creditors, the creditors would still insist that they waive any right to participate in a dividend. That the said William C. Drinnen also advised your affiant that even if the bankrupt did not receive a release from his creditors, the Board of Trade, as assignee for creditors, would still refuse to pay a dividend to the parents of the bankrupt on their claim and would force them to file suit against the assignee for the payment of any dividend to which they might be entitled.

That your affiant then advised Mr. William C. Drinnen that if the creditors represented by the

Board of Trade were going to insist upon the preferential treatment of their claims over the recognized, legitimate claim of the bankrupt's parents, your affiant would have to advise the said Alfonso Paul Sanfilippo, the above-named bankrupt, to immediately file a voluntary petition in bankruptcy to prevent the Board of Trade, as assignee for the benefit of creditors, from paying certain creditors and refusing to pay other creditors although all creditors were of the same class, to wit, general unsecured creditors of the bankrupt.

In accordance therewith, a voluntary petition in bankruptcy was filed in the above-entitled matter on the 16th day of April, 1954, just one day preceding four months after the bankrupt had made the assignment for the benefit of creditors to the Board of Trade of San Francisco.

/s/ HENRY GROSS.

Subscribed and sworn to before me this 4th day of October, 1954.

[Seal] /s/ ADA V. PENNINGTON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed October 11, 1954.

Title of District Court and Cause.]

AFFIDAVIT

Arthur P. Shapro, being first duly sworn, deposes and says:

That he is an Attorney at Law, duly licensed, ever since October, 1927, to practice in, and practicing in, the above-entitled court;

That on the 28th day of January, 1930, Affiant appeared before the Honorable Burton J. Wyman, Referee in Bankruptcy of the above-entitled Court, then sitting at Oakland, California, in the Matter of Max Belling, an individual doing business as "Belling's Furniture House," No. 18765-S in the above-entitled Court, on behalf of California Cotton Mills, Chas. F. Braun Mattress Co., and Dieringer Bros. Furniture Mfg. Co., the Petitioning Creditors in said Involuntary Bankruptcy Proceedings; that then and there, on their behalf, Affiant objected to the voting, by Clarence A. Shuey, Esq., (the Attorney-in-Fact named in the proofs of claim and letters of attorney of a large number of creditors of said Bankrupt) upon the grounds that said claims and letters of attorney had been solicited by the Creditors' Committee at the Board of Trade of San Francisco by circular letters on the letterhead of the said Board of Trade of San Francisco, dictated for said Creditors' Committee by George W. Brainard, the then Secretary of the Board of Trade of San Francisco, and that said George W. Brainard had been the Assignee for the benefit of creditors of said Max

Belling, an individual doing business as "Belling's Furniture House," and would have to account to the Trustee herein;

That when asked by said Referee Wyman whether or not Affiant contended that, if elected, W. E. Dean, the candidate for Trustee nominated by said Shuey, would administer said bankrupt estate other than impartially, fairly and accurately, Affiant responded "No"; that said Referee Wyman then and there stated that on the basis of such concession by Affiant, Mr. Dean, the candidate of the creditors whose claims had been so solicited through the offices of the Board of Trade of San Francisco, would not have any interest adverse to the Bankrupt's estate, and said Referee Wyman thereupon overruled Affiant's objections to the voting of said claims and approved the election of said W. E. Dean as Trustee of said Max Belling, an individual doing business as "Belling's Furniture House," Bankrupt;

That to the knowledge of Affiant, the records of said Referee Wyman in said Belling case originally contained the full transcript of all the proceedings therein, but that, in accordance with custom, the Clerk of the above-entitled Court, after the lapse of approximately ten years following the closing of said Max Belling estate, cause to be destroyed all of the records of said case other than those now remaining therein in the Office of said Clerk;

That the foregoing was dictated by Affiant from personal notes made by Affiant at the time of the hearing above mentioned on the 28th day of Janu-

ary, 1930, which said notes are still in the possession of said Affiant.

/s/ ARTHUR P. SHAPRO,
Affiant.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal] /s/ FRANCES R. WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

William C. Drinnen, being first duly sworn, deposes and says:

That he is, and at all times hereinafter mentioned was, an Assistant Secretary of the Board of Trade of San Francisco;

That he has read the affidavit of Henry Gross, dated October 4, 1954, attached to the Brief herein filed on October 11, 1954, on behalf of Kal W. Lines, Trustee;

That the only discussion had between Affiant and said Henry Gross concerning litigation against the Assignee concerning the payment of any dividend to Providenza Sanfilippo and Venerando Sanfilippo,

the mother and father of said Bankrupt, to which they might be entitled from the proceeds of said Assignee's liquidation of the assets of the above-named Bankrupt, was to the effect that, and Affiant then told said Henry Gross, the only purpose of requiring litigation thereover, on behalf of the Assignee, was in order to have a Court establish not only the amount, but also the legitimacy of the claims of said parents against said Bankrupt, without which the other general creditors would not be satisfied to permit a pro-rata distribution to said parents on their said alleged claim against said Bankrupt.

/s/ WILLIAM C. DRINNEN,
Affiant.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal] /s/ C. J. DORAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

Ben Singer, being first duly sworn, deposes and says:

That he is now, and was at the times hereinafter mentioned, employed by James M. Connors, the

Attorney for the Board of Trade of San Francisco at its office in the City and County of San Francisco;

That at the direction of the Creditors' Committee in the above matter composed of Falstaff Brewing Corporation, A. K. Thanos Co., Rathjen Bros., Inc., Max Sobel Wholesale Liquors, and Haas Brothers, Affiant dictated and caused to be transmitted in the mail to the known creditors of the above-entitled Bankrupt the circular letter dated April 23, 1954, which is "Joint Exhibit No. 1" in the above-entitled matter, and caused to be enclosed in each envelope so addressed to said creditors with a copy of said circular letter, a form of proof of claim and letter of attorney in which, at the time of their transmission to said creditors with said letter, the names of "James M. Conners and/or Vernon D. Stokes" had been stricken out and the type "and/or Shapro & Rothschild" had been inserted therein; that likewise at the time said forms of proofs of claim and letters of attorney were transmitted to said creditors, together with the letter of April 23, 1954, the name and address of James M. Conners, 444 Market St., San Francisco, California, as the Attorney for the creditors, had, on the face of the proof of claim, been stricken and the firm name of Shapro & Rothschild, 155 Montgomery Street, San Francisco, California, typed therein in lieu thereof;

That the insertion of the words "and/or" in type preceding the firm name of Shapro & Rothschild in said letters of attorney was inadvertent and was not designed to permit the insertion of any name in

front thereof, nor were said words inserted therein prior to the cancellation of the names of Connors and Stokes therefrom;

That, to the personal knowledge of Affiant, no changes or additions in any form were made on the proofs of claim filed herein on said forms and voted by Arthur P. Shapro, Esq., by or with the knowledge of said James M. Connors and/or the Board of Trade of San Francisco after said proofs of claim, executed by said creditors, were returned to and received in the office of said Board of Trade of San Francisco;

That the substitution of the name "Shapro & Rothschild" for the names of James M. Connors and/or Vernon D. Stokes in the said Letter of Attorney before the transmission of the forms to said creditors was caused to be made by said Affiant at the instruction of said Creditors' Committee.

/s/ BEN SINGER,
Affiant.

Subscribed and sworn to before me this 22nd day of October, 1954.

[Seal] /s/ JEAN GRANT,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

The matter before this Court is a petition for review of an order of a referee in bankruptcy. The order in question appointed a trustee in bankruptcy after an election contest. Petitioners are creditors whose claims were disqualified by the referee from being voted in the election contest.

Before the bankrupt filed his voluntary petition in bankruptcy, he made a general assignment for the benefit of creditors, naming Walter J. Hempy, who is the Secretary of the Board of Trade of San Francisco, as assignee. At a general meeting of creditors a creditors' committee was appointed, and all of the members of the committee were members of the Board of Trade.

After the bankrupt filed a voluntary petition in bankruptcy, the creditors' committee sent a form letter (on stationery of the Board of Trade) to the creditors, soliciting their proofs of claim. At the first meeting of creditors before the referee in bankruptcy a contest took place over the election of a trustee. The referee sustained objections to the claims of petitioners that were obtained through the activity of the creditors' committee. Petitioners represent the overwhelming majority of the bankrupt's creditors both in number and in the aggregate amount of their claims. The minority creditors admit, and the referee specifically found, that petitioners' nominee for trustee is in all respects quali-

fied to act in that capacity and would administer the bankrupt estate impartially, fairly and accurately. It is further conceded that petitioners' nominee for trustee is not connected or associated with the Board of Trade, or with the named assignee.

The basis on which the referee disqualified the claims solicited by petitioners is the referee's finding that in soliciting those claims " * * * it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt * * * "

At the outset this Court takes note of the weight to be given findings of the referee in bankruptcy. The rule in this Circuit is that the findings of the referee should not be set aside unless clearly erroneous. This rule received its most recent statement in the case of *Earhart v. Callan*, 9th Cir., March 10, 1955, in which the court said:

"[The General Orders in Bankruptcy] require the District Court to accept the referee's findings unless clearly erroneous. *Humphrey v. Hart*, 1946, 9 Cir., 157 F. 2d 844; in re *Skrentny*, 1952, 7 Cir., 199 F. 2d 488, 492."

In the case of *Humphrey v. Hart*, 9th Cir., 157 F. 2d 844, 846, the court put it this way:

"If the master's findings were clearly erroneous, the court should have rejected them and should have made findings of its own. If not

clearly erroneous, the master's findings should have been accepted as correct."

A helpful statement is also found in the case of *In re Josephson*, 1st Cir., 218 F. 2d 174, 182:

"'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."

The rule stems from General Order in Bankruptcy 47:

"Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

Petitioners have advanced the argument that since General Order in Bankruptcy No. 13 was abrogated in 1939, a referee does not have the power to disapprove the election of a trustee. General Order No. 13 provided:

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved, and he shall be removable by the referee or by the judge."

But a similar provision is now found in Section 2(a)(17) of the Bankruptcy Act, which provides that the courts of bankruptcy are invested with the power to:

“Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do * * *”

Therefore this Court does not hold that referees in bankruptcy have lost their supervisory power over the election of a trustee; but this Court will examine the proceedings before the referee to see if that power was exercised for good cause. In the case of *In re Leader Mercantile Co.*, 5th Cir., 36 F. 2d 745, 746, the court referred to this supervisory power as follows:

“Of course, this power is not to be used arbitrarily but only for good cause, in the exercise of sound judicial discretion.”

In the case of *In re Allied Owners' Corporation*, E.D. N.Y. 4 F. Supp. 684, 687, the court said that this power should be exercised only in an emergency, and that “* * * the emergency must not be a trivial one. It should be of grave character and due weight * * *”

Conceding the power of a referee to disapprove the election of a trustee, this Court must examine the order of the referee to determine whether the power was exercised for good cause, or whether the order of the referee was clearly erroneous.

It is elementary that the theory of the Bankruptcy Act is to allow the creditors to select a trustee. This principle is well expressed in the case of *In re Allied Owners' Corporation*, E.D. N.Y., 4 F. Supp. 684, 687:

“The purpose of the Bankruptcy Act is to permit creditors to direct and supervise the liquidation of a bankrupt estate. The estate belongs to them. * * * It cannot be denied that the vital interest which creditors have in the preservation and wise management of the estate of a bankrupt must as a general rule make for the best judges of who shall be appointed as trustee and their selection cannot be arbitrarily ignored.”

This principle is carried into the Bankruptcy Act in 11 U.S.C.A. §72, which provides in part:

“(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees, or of other similar controlling bodies, shall * * * appoint a trustee * * *”

Petitioners are not within any of the classes of creditors that are excluded by Section 72 from taking part in the selection of a trustee. In view of this fact, and in view of the fact that petitioners' nominee for trustee is conceded to be competent, fair and impartial, there must be the most com-

elling reasons for disenfranchising the great majority of the creditors in favor of a small minority of them. The reason given by the referee is that petitioners' votes represented an attempt by petitioners to retain "some sort of control" over the bankrupt estate for the benefit of the Board of Trade. This finding is based primarily on the following facts: the creditors' committee was composed of members of the Board of Trade; the committee used the facilities of the Board of Trade to solicit proofs of claims; and if the petitioners are allowed to vote all of the claims they hold, they will control the selection of the trustee. From these facts the referee attempts to torture some adverse or conflicting interest or prejudicial association, which would disenfranchise any offending creditors, even though the trustee proposed by such creditors is under no such alleged disability except through the creditors who propose him. Such an interpretation would frustrate the purpose behind the provisions of the Bankruptcy Act authorizing the election of the trustee by creditors. Any creditor who had made an assignment for the benefit of creditors before bankruptcy would be automatically disqualified. It commonly occurs that creditors who agree on the selection of a creditors' committee will agree on a candidate for the trustee in bankruptcy, and the mere fact that these same creditors are members of a trade association should not, without more, operate to disqualify the votes of the great majority of creditors.

No exact precedent has been cited for the action here taken by the referee. A case which comes closest to resembling the facts of the case at bar is *In re Stowe*, N.D. Calif., 235 Fed. 463; but there the court said at page 464:

“If creditors knowingly join with the bankrupt or his attorney, or with an assignee or his attorney, * * * the simplest and most obvious way to defeat their purpose is to reject their selection of a trustee * * *”

Clearly the petitioners did not join with the bankrupt or his attorney, or with the assignee or his attorney, and therefore the *Stowe* case does not sustain the action of the referee here. Other cases of disqualification for some sort of association or relationship with the bankrupt are not in point here.

It is the opinion of this Court that no sufficient showing has been made of a basis for disqualifying the claims solicited by petitioners, and in the absence of compelling reasons for disenfranchising the great majority of the creditors, it is a clear error to do so.

Counsel for petitioners shall prepare and present findings, conclusions and an order in accordance herewith.

Dated: March 31, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed April 1, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER RULE 5(e) OF THE RULES OF PRACTICE OF THE ABOVE-ENTITLED COURT

Upon motion of Max H. Margolis made this day before the above-entitled Court, and good cause appearing therefor,

It Is Hereby Ordered that the time for the filing of proposed amendments to the findings of fact and conclusions of law heretofore lodged with the Clerk of the above-entitled Court on April 20, 1955, be, and the same is, hereby extended to and including May 4, 1955.

Dated: San Francisco, in said district; April 22, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

PROPOSED AMENDED FINDINGS,
CONCLUSIONS OF LAW AND ORDER

The Petition for Review filed herein on June 7, 1954, seeking a review and an order reversing the order made and entered on May 26, 1954, by the

Honorable Burton J. Wyman, one of the Referees in Bankruptcy of the above-entitled Court, before whom the above-entitled proceedings have been, and now are pending, wherein one Kal W. Lines was appointed Trustee of the estate of the above-named bankrupt, together with said Referee's Certificate of Record, Findings of Fact and Conclusions of Law Relative to Contest Over Election of Bankruptcy Trustee, pursuant to the provisions of Section 39(c) of the Bankruptcy Act and the provisions of Rule 9 of the Rules of this Court, the petitioners being represented by Messrs. Shapro & Rothschild and respondent Kal W. Lines represented by Max H. Margolis, Esq., briefs having been submitted to the Court, and upon all of the records, papers, documents and files in said above-entitled proceeding this Court makes the following findings:

(1) On December 17, 1953, the above-named Alfonso Paul San Filippo made a general assignment for the benefit of his creditors in which said assignment one Walter J. Hempy was named as the assignee.

(2) Thereafter certain action was and/or certain actions were taken by and/or through said Walter J. Hempy characterized as aforesaid, with reference and/or relative to the affairs and/or property of said Alfonso Paul San Filippo at certain meetings held at the Board of Trade of San Francisco and at which said meetings certain members and/or employees of the Board of Trade were present and participated.

(3) On April 16, 1954, said Alfonso Paul San Filippo filed with the Clerk of the above-entitled Court his voluntary petition seeking to be adjudged a voluntary bankrupt.

(4) Thereafter, and on April 16, 1954, Alfonso Paul San Filippo was adjudged a bankrupt by the above-entitled Court, and the above-entitled bankruptcy proceedings were referred to the Honorable Burton J. Wyman, one of the Referees in Bankruptcy of said Court, to take such further proceedings therein as are required and permitted by the Bankruptcy Act.

(5) On or about April 23, 1954, a certain form letter was prepared and copies thereof mailed to bankrupt's creditors, the facilities of said Board of Trade and/or its membership being used in the preparation of said letter; that the members of the Creditors' Committee, at the time said letter was prepared and sent to the creditors were, and each, was a member of said Board of Trade.

(6) On May 20, 1954, the first meeting of creditors, after due notice to all interested parties had been given, was held before the said Referee in Bankruptcy at Room 609, Grant Building, 1095 Market Street, San Francisco, California, pursuant to and in accordance with said notice.

(7) During the course of said meeting, certain claims were voted by Arthur P. Shapro, Esq., for John M. England, and certain other claims were voted by Kal W. Lines, on behalf of himself.

(8) That, at the time said Walter J. Hempy was named in the aforesaid assignment for the benefit of creditors, as the assignee, said Walter J. Hempy then was, ever since has been, and now is, the Secretary of the Board of Trade of San Francisco.

(9) That, at the time of the filing of the petition in bankruptcy herein there was in the hands of Walter J. Hempy, as the assignee named in said assignment and/or in the office, or a bank account under the control of said Board of Trade the sum of \$4,054.88.

(10) That all the activities of the membership of said Creditors' Committee, in connection with the aforesaid assignment and the aforesaid affairs and/or property of said Alfonso Paul San Filippo, after the making by him of the aforesaid assignment, were as members of said Board of Trade and not merely as creditors of said Alfonso Paul San Filippo.

(11) That there were nineteen (19) claims voted by Arthur P. Shapro, Esq., aggregating the sum of \$4,314.82 which were objected to by, or on behalf of Kal W. Lines and the creditors represented by him, each of which had been "filled out" on a claim form used by said Board of Trade and which, as originally printed, had the following wording at the top thereof:

"Under within Letter of Attorney, all dividends should be forwarded to James M. Con-

ners, 444 Market Street, San Francisco, Calif., Attorney for Claimant”;

that the aforesaid quoted language had been obliterated by the use of numerous type letter “Exes” and in the place of said obliterated words, the following wording was substituted in typewriting at the top of each claim form:

“Under within Letter of Attorney, all dividends should be forwarded to Shapro & Rothschild, 155 Montgomery Street, San Francisco, California, Attorneys for Claimant.”

(12) That from each of the last-mentioned nineteen (19) claims (which as originally had printed, on each of the forms especially used by the Board of Trade and/or its membership in the solicitation of claims to be voted for trustees in Bankruptcy, and for other purposes, the following language appeared, “Claimant authorizes James M. Connors and/or Vernon D. Stokes, * * * or either of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid * * * and in his or its name * * * to vote for a trustee, or trustees * * *”) had been stricken the last above-quoted language, by the use of a heavy black, obliterating line, the words “James M. Connors and/or Vernon D. Stokes” and in their stead had been typed the words “and/or Shapro & Rothschild.”

(13) That Walter J. Hempy, named in said assignment for the benefit of creditors in all his activities in connection with the aforesaid affairs and property of said Alfonso Paul San Filippo were

performed not as an assignee on his own behalf, but as a Secretary of the Board of Trade and in truth and in fact acting, in said assignment, wherein he was named assignee for and on behalf of said Board of Trade and/or the membership of said Board of Trade, and not otherwise.

(14) That in causing to be prepared and sent out the aforesaid letter and each of the aforesaid nineteen (19) claims, in the manner and under the circumstances aforesaid, it was the intent, on the part of said Creditors' Committee, acting for said Board of Trade, indirectly to keep, if possible, some sort of control over the assets of the estate of the above-named bankrupt, at least to the extent of such assets as were in the hands of Walter J. Hempy and/or said Board of Trade.

(15) That in the light of all the circumstances, it would not be, nor is it, for the best interests of all the creditors of Alfonso Paul San Filippo, and particularly the creditors who, or which, are not members of said Board of Trade to count the claims procured in the manner, and under the circumstances aforesaid, in voting for any candidate for trustee in the above-entitled matter.

(16) That John M. England has but one (1) claim in the sum of \$193.88, favoring him as trustee, to which no valid objection has been made.

(17) That Kal W. Lines, so far as number was, and is, concerned herein, has three (3) claims aggregating the sum of \$375.65, favoring him, as trustee herein to which no valid objection has been

made, and that none of such claims is that of any member of said Board of Trade.

(18) That Kal W. Lines, so far as amount was, and is concerned herein, has five (5) claims (including the three last mentioned claims) in the total sum of \$407.21, favoring him as trustee herein, to which no valid objection has been made, and that none of said claims is that of any member of said Board of Trade.

(19) That nothing herein contained is intended to be construed, nor is it, any reflection whatsoever on said John M. England to act as a trustee in Bankruptcy.

In accordance with all of the papers, files, documents and circumstances shown by the record herein, the Court concludes:

(1) That Kal W. Lines has a majority, both in number and in amount of claims of creditors which are entitled to be counted herein to be voted for trustee;

(2) That, to allow any of the aforesaid nineteen (19) claims to be voted for any candidate for the herein trusteeship would be for the Court to act contrary to the dictates of sound judicial discretion and also contrary to good practice in the Bankruptcy Court of this Jurisdiction;

(3) That, the "offers to prove," made by counsel designated in the aforesaid letter to represent the aforesaid Creditors' Committee should be, and is, denied, and the objections made by the representative of Kal W. Lines, to each of the aforesaid

nineteen (19) claims, so far as voting purposes are concerned herein, should be sustained:

(4) That Kal W. Lines alone should be appointed trustee in bankruptcy of the estate of the above-named bankrupt upon the filing of a bond in an amount to be fixed by this Court.

It, Therefore, Hereby Is Ordered:

That the order made, and entered herein on May 26, 1954, by the Referee before whom these proceedings have been, and now are, pending is adopted, confirmed and approved.

Dated: San Francisco, in said district;

May, 1955.

.....,

United States District Judge.

Receipt of Copy acknowledged.

Lodged May 3, 1955.

[Title of District Court and Cause.]

ORDER

It Is Ordered that this Court's Memorandum and Order dated March 31, 1955, in the above-entitled matter be amended as follows:

Strike the following sentence appearing on page five, lines 14, 15, and 16 of that Memorandum and Order:

“Any creditor who had made an assignment for the benefit of creditors before bankruptcy would be automatically disqualified.”

And substitute in its place the following sentence:

“Any creditor for whose benefit an assignment had been made before bankruptcy would be automatically disqualified.”

Dated: May 25, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed May 25, 1955.

In the Southern Division of the United States District Court for the Northern District of California

No. 42878

In Bankruptcy

In the Matter of:

ALFONSO PAUL SAN FILIPPO,

Bankrupt.

ORDER REVERSING REFEREE'S ORDER
APPOINTING KAL W. LINES TRUSTEE

The Petition for Review heretofore filed herein on the 7th day of June, 1954, by Falstaff Brewing Corp., Goebel Brewing Company of California,

Monteverde & Parodi, Inc., Ralph Montali, Inc., Pacific Gas & Electric Company, Pabst Brewing Company, Harry F. Rathjen Co., San Francisco Brewing Corporation, Melvin Sosnick Company, Twin Peaks Distributing Co., Vick's Distributing Company, N. Cervelli & Company, California Wine Association, Brown & Bigelow, Carlo Arbasetti, and The Albert Peters Co., praying for review and reversal of that certain Order made and entered herein on the 26th day of May, 1954, by Hon. Burton J. Wyman, Referee in Bankruptcy, herein and whereby one Kal W. Lines was appointed Trustee of the estate of the above-named Bankrupt, having regularly come on for hearing before the above-entitled Court, together with said Referee's Certificate and Report relative thereto, in accordance with the provisions of Section 39(c) of the Bankruptcy Act, said Petitioners being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), their attorneys, and said Kal W. Lines being represented by Max H. Margolis, Esq., his attorney, and the matter having been argued by counsel for the respective parties upon briefs submitted to the Court and upon all of the other records, papers and files herein, and the Court being fully advised in the premises Finds:

1. That said Petitioners at the First Meeting of Creditors of said Bankrupt herein, represented the overwhelming majority of the Bankrupt's creditors both in number and in the aggregate amount of their claims.

2. That John M. England, the nominee of said Petitioners for Trustee, is in all respects qualified to act in that capacity and would administer said bankrupt estate impartially, fairly and accurately.

3. That said nominee, John M. England, is not connected or associated with the Board of Trade of San Francisco or with Walter J. Hempy, the assignee for the benefit of creditors of said Bankrupt.

4. That there is no evidence to support the Referee's finding that the votes of said Petitioners represented an attempt by them to retain some sort of control over the bankrupt estate for the benefit of said Board of Trade.

Wherefore, the Court Concludes:

1. That said Referee in Bankruptcy exercised his discretion to disapprove the election of said John M. England as Trustee of the above estate without good cause therefor.

2. That said Petitioners were not disqualified from voting for their said nominee as such Trustee herein and should not be disenfranchised upon any of the grounds offered by the creditors whose claims voted for said Kal W. Lines as such Trustee and/or by said Referee in Bankruptcy in his said Findings and Order dated May 26, 1954.

It Is Hereby Ordered that the aforesaid Order of said Referee in Bankruptcy dated the said 26th day of May, 1954, whereby said Kal W. Lines was appointed Trustee of the estate of the above-named

Bankrupt be and it is hereby reversed, set aside and annulled; and

It Is Further Ordered that said Referee in Bankruptcy make and enter herein an Order approving the election of and appointing as Trustee of the above-named bankrupt estate the said John M. England, such appointment to be effective upon the filing with said Referee in Bankruptcy by said John M. England of bond with sufficient sureties to be approved by said Referee in Bankruptcy in the sum of \$2,500.00; and

It Is Further Ordered that said Referee in Bankruptcy proceed in the above-entitled matter hereafter in all matters in a manner consistent with the views expressed by this Court in its Memorandum and Order dated March 31, 1955, and filed herein on April 1, 1955, and in accordance with this Order.

Dated at San Francisco in said District this 25th day of May, 1955.

/s/ OLIVER J. CARTER,
District Judge.

Approved as to form as provided in Rule 5(e) of the above-entitled Court.

.....
Attorney for Kal W. Lines.

Receipt of Copy acknowledged.

Lodged April 20, 1955.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Kal W. Lines hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order Reversing Referee's Order Appointing Kal W. Lines Trustee made and entered in the above-entitled proceedings by the Honorable Oliver J. Carter, one of the Judges of the above-entitled Court, on May 25, 1955, which said order set aside and annulled the order of the Referee in Bankruptcy dated May 26, 1954, appointing Kal W. Lines Trustee of the estate of the above-named bankrupt.

Dated: June 13, 1955.

/s/ MAX H. MARGOLIS,
Attorney for Appellant,
Kal W. Lines.

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, on the 27th day of May, 1954, the Referee in the above-entitled bankruptcy case appointed Kal W. Lines, Trustee thereof; and

Whereas, under date of June 7, 1954, Falstaff Brewing Corporation, Goebel Brewing Company of California, Monteverdi and Parodi, Inc., Ralph

Montali, Inc., Pacific Gas & Electric Company, Pabst Brewing Co., Harry F. Rathjen Co., San Francisco Brewing Corporation, Melvin Sosnick Co., Twin Peaks Distributing Co., Vick's Distributing Co., N. Cervelli & Company, California Hawaiian Association, Brown & Bigelow, Carlo Arbasetti, and The Albert Peters Company, Creditors of said bankrupt, petitioned for a review of the appointment of said Kal W. Lines as Trustee of said bankrupt estate; and

Whereas, under date of May 25th, 1955, the Judge of the said United States District Court for the Southern Division, Northern District of California, issued an order reversing the order appointing Kal W. Lines as Trustee of said bankrupt estate; and

Whereas, the said Kal W. Lines as such Trustee is dissatisfied with said judgment and is desirous of appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

Now Therefore, In consideration of the premises and of such appeal, The Metropolitan Casualty Insurance Company of New York, a corporation, having its principal place of business in the State of New Jersey and duly incorporated under the laws of the State of New York for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all of the requirements of all of the laws respecting such corporations, does hereby undertake in the sum of Two Hundred Fifty Dollars (\$250.00), and

promise on the part of the said appellant that appellant will pay all damages and costs which may be awarded against him on said appeal or on a dismissal thereof, not exceeding the aforesaid sum of Two Hundred Fifty Dollars.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to The Metropolitan Casualty Insurance Company of New York of not less than ten days, proceed summarily in the action in which the same is given to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment therefore against it and award execution therefor.

Dated at San Francisco, California this 13th day of June, 1955.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK.

Attorney-in-Fact.

[Seal] By /s/ D. W. PORTER,

State of California,
City and County of San Francisco—ss.

On this 13th day of June in the year One Thousand Nine Hundred and fifty-five before me, Chester K. Dudley, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, per-

sonally appeared D. W. Porter, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of The Metropolitan Casualty Insurance Company of New York (a Corporation), and acknowledged to me that he subscribed the name of said Corporation thereto as surety and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the day and year in this certificate first above written.

/s/ CHESTER K. DUDLEY,

Notary Public in and for the City and County of San Francisco, California.

My Commission Expires May 23, 1956.

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the parties:

Voluntary petition in bankruptcy and verified list of creditors.

Order of Adjudication and Reference.

Statement of Affairs and Schedules A and B.

Certificate and report of referee relative to petition for review of referee's order of May 26, 1954, with summary of record, findings of fact and conclusions of law relative to contest over election of bankruptcy trustee.

Petition for review.

Order extending time to file petition for review.

Order staying administration pending review.

Affidavit of Arthur P. Shapro.

Affidavit of William C. Drinnen.

Affidavit of Ben Singer.

Affidavit of Henry Gross.

Memorandum and Order.

Copy or order reversing referee's order appointing Kal W. Lines, Trustee, lodged April 20, 1955.

Order extending time to file proposed amendments to findings of fact and conclusions of law under Rule 5(e) of the Rules of practice of the above-entitled Court.

Proposed amended findings, conclusions of law and order.

Order.

Order reversing referee's order appointing Kal W. Lines, Trustee.

Notice of appeal.

Designation of contents of record on appeal
under Rule 75(a).

Appellee's designation of record on appeal.

Cost bond on appeal.

Claims Nos. 1 to 19, inclusive.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
19th day of July, 1955.

[Seal] C. W. CALBREATH,
 Clerk.

By /s/ WM. C. ROBB,
 Deputy Clerk.

[Endorsed]: No. 14821. United States Court of
Appeals for the Ninth Circuit. Kal W. Lines, Ap-
pellant, vs. Falstaff Brewing Co., et al., Appellee.
Transcript of Record. Appeal from the United
States District Court for the Northern District of
California, Southern Division.

Filed July 19, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14821

KAL W. LINES,

Appellant,

vs.

FALSTAFF BREWING COMPANY, et al.,

Appellees.

APPELLANT'S CONCISE STATEMENT OF
POINTS TO BE URGED UPON APPEAL

Comes now Kal W. Lines, Appellant herein, and in accordance with Rule 75(d) of the Federal Rules of Civil Procedure, specifies the following as a concise statement of the points of which he intends to rely on the Appeal, from the Order Reversing Referee's Order Appointing Kal W. Lines Trustee, made and entered by the Honorable Oliver J. Carter, United States District Court Judge, for the Northern District of California, on May 25, 1955, and more particularly specified and described in the Notice of Appeal heretofore filed with the Clerk of said District Court on June 13, 1955, as follows:

1. The District Court in said order of May 25, 1955, erred in ordering that the order of the Referee in Bankruptcy dated the 26th day of May, 1954, whereby said Kal W. Lines was appointed Trustee

of the estate of Alfonso Paul San Filippo be reversed, set aside and annulled.

2. The District Court in said order of May 25, 1955, erred in ordering that the Referee in Bankruptcy make and enter an order approving the election of and appointing as Trustee of said bankrupt estate one John M. England and that such appointment be effective upon the filing with the Referee in Bankruptcy by said John M. England of a bond with sufficient sureties to be approved by the Referee in Bankruptcy in the sum of \$2,500.

3. The District Court in the order of May 25, 1955, erred in ordering that the Referee in Bankruptcy proceed in said bankruptcy proceedings in all matters in a manner consistent with the views expressed by said Court in its Memorandum and Order dated March 31, 1955, and filed with the Clerk of said Court on April 1, 1955, in accordance with its said order of May 25, 1955.

4. The District Court erred in finding that the Appellees at the first meeting of creditors of said bankrupt represented the overwhelming majority of the bankrupt's creditors, both in the number and in the aggregate amount of their claims.

5. The District Court erred in finding that there is no evidence to support the Referee's finding that the votes of Appellees represented an attempt by them to retain some sort of control over the bankrupt estate for the benefit of the Board of Trade.

6. The District Court erred in concluding that the Referee in Bankruptcy exercised his discretion to disapprove the election of John M. England as Trustee of the bankrupt estate without good cause therefor.

7. The District Court erred in concluding that Appellees were not disqualified from voting for their nominee as such Trustee of the estate of said bankrupt, and should not be disenfranchised upon any of the grounds offered by the creditors whose claims voted for Appellant, Kal W. Lines, as such Trustee and/or by said Referee in Bankruptcy in his Findings and Order, dated May 26, 1954.

Dated: September 21st, 1955.

/s/ MAX H. MARGOLIS,
Attorney for Kal W. Lines,
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 22, 1955.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between Max H. Margolis, attorney for Kal W. Lines, Appellant, and Messrs. Shapro & Rothschild, attorneys for Appellees, that the proofs of claim numbered 1-19, inclusive, appearing as Item 21 in the Designation of Contents of Record on Appeal under Rule 75(a), may be considered by the above-entitled Court in their original form without the necessity of being printed.

Dated: September 21st, 1955.

/s/ MAX H. MARGOLIS,
Attorney for Kal W. Lines,
Appellant.

SHAPRO & ROTHSCHILD,

By /s/ [Indistinguishable.]
Attorneys for Appellees.

[Endorsed]: Filed September 22, 1955.

